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No. 69.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

THE UNITED STATES, APPELLANT,

v.

THEODORE DALCOUR ET AL., HEIRS OF JOHN FORBES, deceased, et al.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA.

REPLY BRIEF OF APPELLANT.

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THEODORE DALCOUR ET AL., HEIRS OF John Forbes, deceased, et al. } No. 69.

REPLY BRIEF OF APPELLANT.

To the three briefs filed by appellees the appellant, by leave of the court, presents this reply:

I.

JURISDICTION.

(*a*) The appeal was taken under the *mandatory* provisions of the act of 1860, section 11: "If the decree be against the United States, an appeal shall be entered to the Supreme Court of the United States." In the case of claimants, from an adverse decision, an appeal *may* be taken.

(*b*) This is a case against the United States, brought under an act conferring special jurisdiction in a class of cases for the *final* adjustment of private land claims in certain territories.

It has been decided time and again that the right of the Court of Claims to entertain jurisdiction of cases in which the United States is defendant and to render judgment against the defendant is only by virtue of acts of Congress granting such jurisdiction, and it is limited precisely to such cases, both in regard to parties and to the cause of action, as Congress has prescribed.

And this regulation by Congress extends to the entire procedure, including the right and the manner of appeals. So when concurrent jurisdiction was given to the District and Circuit Courts of the United States to entertain suits against the Government by the act of March 3, 1882, this court decided that the right and manner of appeal from those courts was the same as reserved in the Court of Claims act, but that the right of appeal to the Supreme Court in the instance of any judgment adverse to the United States can be exercised by the United States in any case of the prosecution of a claim in these courts. (*United States* v. *Davis*, 131 U. S., 36, 39.)

So by the act of March 3, 1891 (the same date as the Circuit Court of Appeals act), to establish a court of private land claims in certain States and Territories, an appeal to the Supreme Court is provided for. In *United States* v. *Coe* (155 U. S., 76,) altho the question whether the appeal should be to the Circuit Court of Appeals or to the Supreme Court did not arise, it was expressly decided that under the statutory provision the direct appeal would lie.

And this reasoning seems to have been recognized in *Re Hohorst* (150 U. S., 653, 661), where Mr. Justice Gray, speaking of original jurisdiction conferred by the act of August 13, 1888, c. 866, says: "The grant to the Circuit Courts of the United States in this section of jurisdiction over a class of cases described generally as 'arising under the Constitution and laws of the United States' does not affect the jurisdiction granted by earlier statutes to any court of the United States over specified cases of that class."

Always the policy has been that these special cases should go straight from the District Court to the Supreme Court (sec. 9, act of May 26, 1824, 4 Stat. L., 52; sec. 7, act of May 23, 1828, 4 Stat. L., 284). The reason of this policy is manifest, viz, so that there should be a prompt and conclusive decision, by the highest tribunal, of questions involving the law of nations, the declarations of treaties, and the principles of equity and justice, as well as peculiar considerations of national honor.

This reason and such policy in this special peculiar line of cases has certainly survived the Circuit Court of Appeals act, although there has been no legislative occasion for reannouncing them since the act of 1860. The fact that the question of the right of direct appeal, under these circumstances, has never been presented to this court supports our view.

It is submitted respectfully that *Gwin* v. *United States* (184 U. S., 669), can be clearly distinguished

from the present case. There the appeal granted directly to the Supreme Court from the District Court by the act of 1851 was taken away by the act of 1864, except as to cases where an appeal had already been taken and an appeal allowed from the District to the Circuit Court. By the Circuit Court of Appeals act all appellate jurisdiction was taken away from the existing Circuit Courts, and it was specifically enacted that no appeal should be taken from the District to the Circuit Courts.

Mr. Justice Brown, delivering the opinion of the court, did say:

> As this case does not fall within any of classes excepted by sec. 5, it is clear that if any appeal will lie at all, it should have been taken to the Circuit Court of Appeals, and that we have no jurisdiction to enforce the execution of this decree by appeal from the district court.

But he also said, page 674:

> It is clear that, so far as concerns appeals from final decrees, they must be taken under laws then in existence, and to the court provided by such laws. To say that a decree rendered in 1900 may be appealed to a court whose jurisdiction to review it was taken away in 1864 is beyond belief. Even if the Court of Appeals act do not apply to this case, the jurisdiction of this court was clearly taken away by the act of 1864, and transferred to the Circuit Court of the United States for California.

And that was the matter decided.

(*c*) But even if the Circuit Court of Appeals act applies, the construction of the treaty is really and substantially drawn in question in this case. The petitioners asserted their right as dependent on the treaty in the original petition and in the amendment of 1878 by reference to the original petition. The United States in the fifth paragraph of the answer (p. 70) relied upon the treaty. The petitioners sought to show by testimony taken after the answer that the grant was good as of January 10, 1818, still relying, of course, upon Article VIII of the treaty, and not until the final amendment of May, 1904, did they repudiate the treaty and rely solely on the act of 1860.

Pretermitting for the present the compelling clause for appeal in the statute of 1860, it may be doubted if any other than the direct appeal would lie. *American Sugar Refining Co.* v. *New Orleans* (181 U. S., 277, 281). And we would undoubtedly have been met with this objection if we had gone to the Circuit Court of Appeals.

The rule, tersely laid down in *Muse* v. *Arlington Hotel Co.* (168 U. S., 431) is not disputed. In that case "the jurisdiction of the Circuit Court was invoked on the ground of diverse citizenship and not on the ground that the case 'arose under the Constitution or laws of the United States or treaties made or which shall be made under their authority.'" "In respect of plaintiffs' case, as stated in their complaint, the Circuit Court decided no question as to the application or construction

of the Constitution or the validity or construction of the treaty." The writ of error, sued out directly to the Circuit Court, was dismissed.

In *Filhiol* v. *Maurice* (185 U. S., 108), growing out of the same facts as stated in the above case of *Muse* v. *Arlington Hotel Company*, the jurisdiction was not invoked on the ground of diverse citizenship, but on the ground that the case arose "under the Constitution or laws of the United States or treaties made or which shall be made under their authority;" and this appeared from plaintiff's statement. This court said (p. 110): "As the Circuit Court took jurisdiction, which could only have been on the latter ground, and decided the case upon the merits, the writ of error was properly taken directly to this court, the jurisdiction of which is exclusive in such cases."

Now what is the record in the case at bar? After stating the claim the petitioners say (Tr. p. 13):

> With such facts as we have presented we claim that the eighth article of the cession binds the U. S. to confirm the title of John Forbes to those lands of which we had possession under a title to all respects perfected at the date of the treaty. That the fact that the U. S. pointed out specifically the land titles in Florida, which were objected to and canceled by Spain of itself waives all objection to others. (In the treaty they canceled those claims and so confirmed the others.

Upon these statements the District Court took jurisdiction under the act of 1860. We are not to be understood as claiming that this jurisdiction was vested alone upon a case arising under the treaty as provided for in the statutes of general jurisdiction to the Circuit Courts. We are speaking with reference to the contention of counsel that the provision of the act of 1860 for direct appeal has been impliedly repealed, and that, if there is an appeal at all in these cases it must lie to the Circuit Court of Appeals.

The matter is not at all of original but of appellate jurisdiction, and we are mindful of the distinctions. The direct appellate jurisdiction from the District and Circuit Courts is "in any case in which the constitutionality of any law of the the United States, or the validity or construction of any treaty made under its authority, is drawn in question." The confirmation of grants under the treaty of 1819 could be only of grants prior to January 24, 1818. If complete grants in Florida, those could undoubtedly be confirmed under the eleventh section of the act of 1860 for the final adjustment of private land claims. This could be inquired into under the petition in this case.

The answer of the United States denies the grant as set up and expressly states that the evidence relied on were exemplifications of forged papers, altered so as to bring them within the terms of the

treaty. All the evidence introduced by petitioners subsequently was to support a grant confirmed by the treaty.

Finally, at the hearing they asked leave of the court to make the amendment that the grant upon which they rely was made on February 20, 1818. Waiving here for the sake of the argument all other disputes, the answer to this was a denial that any such grant was made and an allegation that if it was made as alleged, it was made after the 24th of January, 1818, and declared and agreed to be null and void under the treaty.

There was no evidence introduced by petitioners in support of this latter claim. They relied solely upon the exhibition of the *registro* brought by defendants as a part of the record in the former case to show an altered and forged paper. Had the *registro* been introduced to prove the issue on the part of petitioners it would have been objected to, and the obligation would have been imposed upon claimants to account for the erasures and alterations. As it now stands in a court of equity it is a paper forged to bring it within the terms of the treaty, upon which claimants had, until the last day of the controversy, relied.

The extraordinary contention is now set up that the validity and construction of the treaty is not drawn in question. The case of *Mitchell* v. *Furman* (180 U. S., 402) is applicable to this case. There the petitioners claimed on a grant which they asserted was confirmed by the treaty of 1819.

That case was brought in the Circuit Court upon a grant claimed to have been confirmed by the treaty with Spain, and that the controversy necessarily involved the construction of the treaty. This court said, page 428:

> The pleadings, the evidence, and the master's report and opinion considered, we think that rights under the treaty were so far set up and relied on as to give jurisdiction to the Circuit Court, and to justify an appeal from its decree directly to this court.

Here the contention is much stronger. The jurisdiction of the District Court is unchallenged. The pleadings, evidence, and decree show beyond reasonable doubt that the validity and construction were in question. It is contended, however, that by this late amendment the consideration even of the treaty is avoided.

They can not thus thrust the treaty question out of the case as a real and substantial issue when and because it suits them to do so. They can not, after experimenting with their original and antagonistic theory, take a grant which we offered as an original, to show that it was not a good grant of the earlier date because it was not a good grant at all, and rely upon it as a good grant of a later date under a new theory and thereby oust the jurisdiction of this court. But even so, and even now in the totally irreconcilable aspect which they seek to give to the case, this court must construe the treaty. Petitioners may choose to abandon the treaty,

but they can not eject it from the case they have made. This court in considering and determining the effect of the treaty on the act of 1860 and of the act upon the treaty must deal with the validity of the treaty, not perhaps its validity in general as an established historic contract of the United States, but the validity and meaning of Article VIII and Article II.

The court must apply the treaty, and in applying the treaty to this case and to the act, in considering whether the act abrogated the treaty and let in grants later than January 24, 1818, the court must construe the treaty as well as the act. Petitioners' concession now that they do not claim under the treaty, can not concede away the court's peculiar and broad jurisdiction over all treaty questions.

The learned counsel say they could proceed without any treaty. How? The very lands were acquired by the United States only by the treaty of cession. What was ceded and what not ceded was determined by the treaty. What might be considered as claims growing out of grants from a former sovereign had to be considered with reference to the treaty. What titles could be confirmed had to be determined by reference to the terms, the ratification, the taking effect of the treaty.

In short, it was pleaded and urged by the defendant that if there had ever been a grant to Forbes, of February 20, it was annulled by the

treaty. The annullment was the act of the King of Spain. The United States received these lands freed from any right or claim, legal or equitable, of Forbes. The alleged grant had been destroyed and the treaty so declared. This is denied by the petitioners. And yet it is strangely contended the construction of the treaty is not drawn in question.

Another indication that the construction of the treaty is drawn in question is this: The petitioners argue that they have a vested right which was good against Spain; that, being a vested right, based upon valuable consideration, a mere variation in date is immaterial, the grant being identical, the same grant, in fact, in all other respects; and that, as such, the beneficial intent and effect of the act of 1860 operates upon the grant and revives it or recreates it notwithstanding the bar of the treaty limitation of time.

Upon this contention two observations are to be made: First, the grant was not good against Spain. Plainly Spain annulled it by Article VIII of the treaty—annulled it by anticipation in the negotiations and by relation back when the treaty was signed and then successively ratified by the two powers. Second, the variation in date is material. It is not like the difference between February 7 and 11 in the Texas case cited (page 55 of their main brief). Between the two dates here a date of vital significance was interposed, changing all previous relations, and that makes the variation of date a crucially material fact. (*United States* v.

Galbraith, 2 Black, 394; and see *Wood* v. *Steele*, 6 Wall., 80.)

Counsel think their case is not touched by *United States* v. *Galbraith*, because, they say, there the whole grant was *fabricated* when the authorities had no power, and antedated so as to appear to have been made when they had the power. That is a distinction without a difference, because here the grant was *made* when the authorities had no power, and was antedated with the same motive and purpose as in the Galbraith case.

It is always to be remembered that the foundation of any claim they have under the act of 1860 is because the lands were acquired (sec. 11) "prior to the cession to the United States of the territory in which said lands were included, or where such title was created and perfected during the period while the foreign Government from which it emanated claimed sovereignty over or had the actual possession of such territory." What was the cession here? The treaty, of course, was the cession. When was the cession? During what period did the foreign government claim sovereignty or have actual possession; when the treaty was signed, or when it was ratified by Spain, or when it was ratified by the United States and ratifications exchanged? The answer to these questions is tolerably clear; but whether clear or not, the mere putting of the inquiries shows that the construction of the treaty is really and necessarily drawn in question in the present case.

II.

THE STATUTES OF LIMITATION.

As to the amendment of 1878 adding the heirs of James and John Innerarity, we reiterate the contention that this set up a new cause of action barred by the statute, by pointing out that Mr. Hatfield's "Brief of the Heirs of John Forbes, appellees," reveals the divergence of interest between the Forbes and Innerarity representatives. This divergence is by no means veiled by the supposed community of interest (e. g., pp. 2, 5, 6, 7, 41, 42, 53, 54 of said brief).

That this antagonism between the Forbes and Innerarity interests thus shown is a real factor in the case and points unerringly to the condemnation of the amendment of 1878 as introducing a new cause of action is conclusively established by the "Additional Brief for Appellees," which devotes three pages (3–6) to opposition to Mr. Hatfield's brief on the issue of variance between the petitioners.

III.

As to the amendment of 1904, the proper time to make it was after the answer of the United States setting up the treaty bar and the adjudication of Judge Brackenridge. Instead of amending, then, they speculated with testimony for the regularity of the grant as of January 10, 1818, and concluding that this was hopeless, faced about

squarely with an amendment which was their last substantial pleading in the case. Did not this change come too late? Is the new declaration not a material and fatal variance? Can they avail of a document which we pleaded and produced for one purpose, viz, to show that a grant of January 10 was impossible because there was no valid grant at all, in order to maintain that document as a valid grant of February 20?

III

THE TREATY, THE STATUTES, THE MERITS.

Always such cases are to be decided according to the law of nations, the laws and the stipulations of any treaty of the respective powers (e. g., sec. 2, act of 1824, 4 Stat., at p. 53), "the principles of justice and equity" (McMicken *v.* United States, 97 U. S., at pp. 208–209), and "the principles established by this act" (sec. 11, act of 1860). The principles of justice and equity certainly required the rejection of any claim antedated or forged, whenever that vice appeared, and whether so reported by Commissioners (who might not be informed, as in this case) or not. (See sec. 6, act of 1828, 4 Stat., at p. 285.)

Without dwelling on the earlier and general guides of adjudication, what are the principles of the act of 1860? Surely a court adjudicating under section 11 must regard the principles of the proviso to section 3, which means substantially that a claim previously rejected by an authorized tribunal as fraudulent shall not be confirmed; nor one twice

rejected on the merits by previous boards. In effect the last exclusion has operated here. The commissioners of 1824 plainly disapproved of this claim; the Congress of that time did not confirm it, which is tantamount to rejection. The Territorial court of 1830 rejected it.

But whether twice rejected or not within the meaning of that proviso, it was certainly rejected as fraudulent, because of the alterations, by Judge Brackenridge, whose opinion is before the court and speaks for itself. Judge Brackenridge adjudged this grant in 1830 on a petition which claimed that the grant was "actually guaranteed by the eighth article of the treaty." He did so under laws which necessarily discredited claims antedated or forged and claims annulled by the treaty (sec. 6, act of 1828), and which gave the court "full power and authority to hear and determine *all questions* arising in said cause relative to the title of the claimants" (act of 1824, 4 Stat., at p. 53).

He "refused and rejected" the claim on grounds going to the "validity of the record itself, which is the foundation of the claim;" that is, because "the public instrument * * * is null and void." The grant was not guaranteed by the treaty (in his view) because it was wholly and fundamentally invalid under the law by reason of the alterations. It was not a valid grant before January 24, 1818, because it was not valid at all.

Our opponents say that Judge Brackenridge

exceeded his jurisdiction; that he possessed no power beyond the authority to determine that the grant was not made before January 24, 1818. This is not so under the strictest and most technical construction, as the grant of jurisdiction, *supra*, shows. But that argument is merely adroit. It is a mere feat of dialectic and formal logic.

Their argument amounts to this—it is true that Judge Brackenridge rejected this grant as valid under the treaty because it was not valid at all. But there is no force in his decree now beyond the treaty scope; we do not claim under the treaty. Therefore the question is open, under the act of 1860, whether the grant is valid as of February 26, 1818, and the Brackenridge decision must be altogether ignored as a prior determination of *this* case. But Judge Brackenridge deliberately adjudged this very grant under ample authority, and, no appeal having been taken, that result was final. Both sets of heirs were brought into that case; both are seeking to enter this; the document is the same, the very grant itself.

By such analysis of the previous adjudication it is seen that the doctrine of estoppel reaches this claim. The logical dexterity of counsel reforms and then annihilates the decree of 1830 and creates a new and antagonistic right by virtue of the act of 1860. But when we scrutinize and reflect, it is perceived that the authorities which they cite (main opposing brief, pp. 76, 77) as excluding their case from the operation of estoppel, on the

contrary, perfectly characterize and comprehend it. The simple test is whether the suit of 1830 was not in fact a suit (ending in a decree) between the same parties about the same property, wherein the whole right and all possible rights were litigated. The act of 1860 gave no new right. A claim not good in 1825 because of intrinsic defects is not good under the act of 1860 (McMicken case, as quoted below). The act of 1860 gave in general another chance to present claims; it certainly did not intend to hold for naught prior complete adjudications.

If this case is not dismissed, because by the amendments new causes of action were introduced which are barred, then not only the same grant but the very same case in all substantial respects was conclusively decided by Judge Brackenridge.

Suppose the petitioners in the case of 1830 had appealed to this court and this court had affirmed the decree of Judge Brackenridge, would the petitioners be here now, or if they would, would not the court regard the present issue as *res adjudicata*? Is the determination of Judge Brackenridge any less conclusive as the case stands, since there was no appeal from his decree?

To support the argument against the comprehensive jurisdiction in the Territorial court, the petitioners cite *United States* v. *Baca* (184 U. S., 653). But that case simply decided that grants specifically confirmed by acts of Congress and followed by patents regularly issued were outside the

jurisdiction of the Court of Private Land Claims as defined by the act creating that court. The Court of Private Land Claims held that it was without jurisdiction to decree and confirm the land to the petitioners or to order a survey for that purpose, and yet undertook to adjudge that a perfect title in fee had vested by the Spanish grant in the grantees and remained in them and their successors. This court held that the manifest intent of Congress in the act creating the court below was that with any land of the right to which Congress in the exercise of its discretion had itself assumed the decision, the Court of Private Land Claims should have nothing to do; and that, for this plain reason, the merits could not be decided either by the court below or this court on appeal. That case is altogether different from this. Instead of any such restriction on the authority of Judge Brackenridge, he was empowered to, and did, adjudicate this case completely, as we have seen.

But Judge Brackenridge was right on the merits. He was right about the Spanish law. The petitioners have abandoned their contention (for which they adduced evidence) as to the *salvado*. They admit February 20 as the real date. They glance back to their former notion on that point by the argument that under the Spanish law not the original but the alterations state the true instrument. But this is only as to *commercial* transactions—that is to say, our understanding is that the Spanish rule referred to establishes alterations

in preference to the original writing only in relation to ordinary commercial transactions and mere negotiable instruments; that where in such cases the mitigation of the strict rule as to alterations and *salvados* is applicable, intent must be shown and *bona fides*, and the rule is never relaxed as to more solemn instruments under seal.

The rule is laid down in 1 White, New Recopilacion, 298, quoting the Spanish authorities: "From the third axiom it follows: * * * 3d. That the copy taken from a protocol spoiled or faulty (*viciado*), or wanting solemnities is null, *Pareja*, tit. 1, res. 3, sec. 1, *á* n. 42, *al* 45. * * * 6th. That the escribanos must not alter (*romper*) the protocol, although they may copy (*saquen*) the instruments in public form, Ll. 12 and 13, tit. 25, lib. 4, Rec. (Ll. 6 and 1, tit. 23, lib. 10, Nov. Rec.)"

It must be remembered, however, that by this suggestion the petitioners are merely seeking to excuse and explain the alterations; they are not claiming on the alterations; they are claiming on the grant and date as originally written, namely, February 20, 1818.

But their argument on this point is wholly inconsistent and must be ignored. On pages 81 and 82 of their main brief they rely on the Spanish law as holding that "the alterations will be * * * null and void," and say that the *registro* is intact as if no alterations had been made; and then (pp. 86–88) they argue that the alterations

are regular and valid and properly ratified under a *salvado*, by which they inevitably go back again to a grant of January 10. It is difficult to see how they can successfully escape one horn or the other of the dilemma. If the alterations are good and the grant regular, as of the altered date, which they thus suggest even now, then they have definitely abandoned that claim on the face of their final pleading, the amendment of 1904. If the alterations are null, as they also contend, then they stand on an antedated grant of February 20, and must fail before the treaty stipulation or else must convince the court that the act excludes the treaty and the antedating is an innocent and not a fatal thing. In short, they say in substance, "Probably the court ought to accept the unexplained alteration as regular and official, for in that form only the Spanish authorities solemnly certified this document several times; but if not, then the court ought to say that the alteration is to be wholly ignored, the grant saved under the act of 1860, notwithstanding the treaty, and that the instrument is fair and valid without a trace of fraud or forgery." Surely these are too many alternatives, and the petitioners have astonishing and antagonistic propositions to maintain.

Here the alterations certainly vitiate the grant. We do not need to look back to old conceptions of the common law relieving or charging a party in respect to an alteration. Long ago he was charged,

however the alteration was made; the document itself was sacred. More recently he has been relieved, if his own fraud did not appear, but the exceptions are numerous and significant. A solemn instrument of grant has always been scrutinized by keen suspicion, and many deeds have been accounted as null if such grave doubts on their face have not been removed by proof thus called for from a proponent.

As to governmental grants, the presumptions are always in favor of the Government and the burdens against a grantee. (*Greenleaf Ev.*, secs. 564, 565; *Charles River Bridge* v. *Warren Bridge*, 11 Pet., 420, 546; *Slidell* v. *Grandjean*, 111 U. S., 412, 437; *United States* v. *King*, 7 How., 833, 847; *United States* v. *Teschmaker*, 22 How., 392; *United States* v. *Knight's Admr.*, 1 Bl., 227, 251.)

Especially and peculiarly has a royal instrument of grant from Spain under the treaty of 1819 lain open to these rules. And Spain annulled this grant by the treaty.

Finally, there are two plain reasons why this point is not a matter to be determined by the fine distinctions of ancient or modern authorities in foreign law or our own: First, without respect to presumptions or burdens and altogether apart from motives or intent, the mere antedating in these cases of foreign grants has always lain under unqualified condemnation as contrary to the principles by which the adjudications are guided and contrary to the express language of the statutes

(e. g., section 6 of the act of 1828); second, because manifestly the strongest presumptions should run against an alteration which antedates, when the change attempts to place the instrument ahead of the total bar of an intervening date.

Grant the higher point of view as to fraud in this field laid down in the Arredondo case. It is certain that we can not now prove fraud in procuring or maintaining this grant. But it is equally certain that in disclaiming any intention to impugn present representatives, and in speculating as to reasons and motives for the alterations, the supposition of this Government, on the oral argument, that Spanish officials might have been responsible because of governmental motives of their own is no concession in this case. The alterations were made; they are highly suspicious; the house of Forbes had representatives in Cuba at the time; their interest is manifest; their original exemplification disappears; the United States (in the answer to the Innerarity suit of 1828–1830) called for the production of the supposed original title papers; and it is no violent or unworthy assumption to say that when the petitioners responded to this call by an application for a *subpena duces tecum* addrest to Mr. R. K. Call, they wilingly risked and speculated somewhat, even if James and John Innerarity knew that the Forbes grant was antedated. Surely it is no gratuitous and wholly unfounded suspicion to

suggest that the house of Forbes at the time elected to meet the Government challenge. Very likely they did not know; they trusted to the innumerable chances that fraud was not perpetrated or would not be revealed by the physical state of these ancient papers. They lost, and they accepted the result. The proof is that they did not appeal from the decision of Judge Brackenridge.

The general conviction that the act of 1860 was intended to apply only as well as primarily to the "disputed territory" is shown by the restriction of Mr. Justice Miller, perhaps unconsciously (*United States* v. *Clamorgan*, 101 U. S., at pp. 825–826), to the treaty with France of 1803. Laying that aside, however, because the act includes the State of Florida *eo nomine*, and because the Morant case was decided with reference to territory *east* of the Perdido (like the present case), let us consider that line of decisions. Surely the limitation in the McMicken case (97 U. S., at pp. 208–209) still applies as reinforcing the limitation in the Lynde case (11 Wall., at p. 647), which excepted cases barred by Article VIII of the treaty or void for fraud or any other vice apparent on the the face of the grant.

In the Lynde case Justice Bradley said (11 Wall., at pp. 646–647) that "the act of June 22, 1860, was intended to validate all grants which were made by the Spanish Government to *bona fide* grantees

of lands in the disputed territory whilst the Government remained in possession of the territory and claimed sovereignty over it, *subject, of course, to the express exceptions of the treaty of 1819* and the supplementary declaration of the King of Spain finally annexed thereto. * * * If it should appear that a grant was obtained by fraud *or was affected by any other special vice* it would be the duty of the tribunals to reject it."

Counsel suggest that this reservation of the Lynde case refers only to the three specifically annulled grants which were mentioned in the King of Spain's supplementary declaration appended to the treaty. But evidently not, or why use the conjunctive, "subject, of course, to the express exceptions of the treaty of 1819 *and* the supplementary declaration of the King of Spain annexed thereto." The treaty itself contained the "express exceptions" of Article VIII, but no specific annulments. The court in the Lynde case is speaking of lands in the disputed territory. If the exceptions were to govern there, where Spain's sovereignty and title had never been recognized, then *a fortiori* in the country east of the Perdido. Two of the three grants specifically annulled lay to the east of the Perdido; one, the De Vargas, was in the disputed territory. The treaty and the historic facts give no support to their argument, and the language of Mr. Justice Bradley can not thus be restricted and perverted. It is perfectly well

known that other grants than the three were meant to be annulled and were therefore within the "express exceptions of the treaty." The letter of Mr. Forsyth, quoted at page 75 of our brief, shows this as well as the dissenting opinion in the Arredondo case (6 Pet., at p. 755). The three grants were not excluded in the treaty by name, to save the honor of the King, and because "there were other grants of the same kind and made under similar circumstances. To have named them might have left room for a presumptive inference in favor of others. The determination was to exclude them too." This quotation from a dissenting opinion merely states the fact and challenges no opposite conclusion reached by the court.

In the McMicken case (97 U. S., at pp. 208–209) the same learned justice said:

> We do not understand that the act of 1860 was intended to make any claims valid which would not have been so before if the government making the grant had had the right to make it. The objection of want of title in the granting power was removed by the act as to all grants made by a government in possession which were otherwise sustainable on the principles of justice and equity; the time for presenting claims was opened and extended; and actual surveys were dispensed with where the land could be otherwise identified. These were the principal remedial provisions of the act so far as relates to the validity of titles. *Claims invalid from*

> *intrinsic defects in 1815 or 1825 are not helped by the act of 1860.* The utmost that our treaty stipulations ever required was that we should sustain titles which would have been sustained by the government from which our title to the territory was derived. Nothing more could be fairly asked, and we think that nothing more was intended by Congress to be given, except to make provision (as it did from time to time) in favor of actual settlers.

Did the court, speaking thru Mr. Justice Bradley, in the Morant case, intend to open the door to any cases other than those initiated before, but not completed by survey until after the date limited by the treaty? Did the court mean to say that a grant *after* January 24, 1818, was good? If it did, that is the first and only time the court has announced such view. And if it did, then we deferentially but earnestly contend that the *Morant* decision, if it was uncertain and inconclusive, must be revised and strictly and plainly limited to a case where a grant *before* was not *perfected* until *after* the treaty date, i. e., must exclude a grant not *made* (whenever initiated under an application) *by official action*, until after the treaty date.

The treaty limitation means something; it means *this* at least, notwithstanding the act of 1860. The argument of appellees is undoubtedly able as well as ingenious. But we submit with great confidence that such a grant, now nearly 90 years old,

stale and rejected, antedated and therefore forged, because it purports to be what it is not, can not be affirmed as valid by this court, under the treaty or under the act or under any principles of law, equity, or justice.

HENRY M. HOYT,
Solicitor-General.
ROBERT A. HOWARD,
Special Assistant Attorney.

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FILE COPY.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

No. 69.

UNITED STATES, APPELLANT,
vs.
THEODORE DALCOUR, ET AL., THE HEIRS OF JOHN FORBES,
FANNIE W. J. INNERARITY ET AL., THE HEIRS OF JAMES INNERARITY,
VICTORIA INNERARITY, ET AL., THE HEIRS OF JOHN INNERARITY, APPELLEES.

Office Supreme Court, U. S.
FILED.
OCT 27 1906
JAMES H. McKENNEY,
CLERK.

Appealed from the District Court of the United States, in and for the Southern District of Florida.

Brief of WILLIAM W. DEWHURST, WILLIAM A. BLOUNT AND A. C. BLOUNT, JR., Attorneys for the Appellees.

H. S. White, Printer, Pensacola.

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Brief of WILLIAM W. DEWHURST, WILLIAM A. BLOUNT AND A. C. BLOUNT, JR., Attorneys for the Appellees.

Statement of Pleadings and Proceedings.

(The abbreviation "Tr" refers to printed transcript of record.

This is a suit brought under the provisions of the Act of June 22, 1860, (12 Stat. at Large, p. 86,) entitled "An Act for the final adjustment of private land claims in the States of Florida, Louisiana and Missouri and for other purposes" as extended by the Act of June 10, 1872, (17 Stat. at L. p. 378.)

Its purpose is to procure the confirmation of a Spanish

Grant of land in West Florida, alleged to have been made by Cienfuegos, Captain General of Cuba, on February 20, 1818, to John Forbes and Company, the firm consisting of John Forbes, James Innerarity and John Innerarity, each owning an undivided one-third.

The petition for confirmation (pp. 7-15, Tr.) was filed in the District Court of the Northern District of Florida on the 3rd day of March, 1875, by Theodore Dalcour, *et al.*, heirs of John Forbes.

The petition stated that the grant was made to John Forbes, but referred to and relied upon a copy of the grant proved before the Land Commissioners appointed by the Act of Congress, May 28, 1822, entitled "An Act for Ascertaining Claims and Titles to Lands Within the Territory of Florida," (3 Stat. at L. p. 709,) which copy is found at pp. 95, *et. seq*,, Vol 4, Am. St. Papers, and shows the grant to have been made to John Forbes and Company.

On December 14, 1878, with the permission of the District Judge, the parties to the above petition and the heirs of James Innerarity and John Innerarity, filed an amendment to the petition (pp. 15-17 Tr.) setting out that the allegation in the original petition that the grant was made to John Forbes was a mistake, and averring that it was made to the firm of John Forbes and Company, and that the partners of the firm were John Forbes, James Innerarity and John Innerarity, and each the owner of an undivided one-third, and it prayed the confirmation of the grant to all the petitioners.

On May 19, 1891, the papers in the cause were destroyed by a fire which burned the United States Court House in Jacksonville, Florida.

On July 23, 1894, there was passed the Act of Congress, entitled, "An Act to Change the Boundaries of the Judicial Districts of the State of Florida," (28 Stat. at L. p. 117,) which transferred the case to the Southern District of Florida.

On June 14, 1900, the attorneys for the petitioners presented (pp. 1-6 Tr.) a petition to the District Judge for re-establishment of the destroyed files and records in the case. After the taking of the testimony before the Court (pp. 22-47 Tr.) and an answer by the United States and a demurrer and replication to it by petitioners (p. 49, Tr.) the Court decreed the re-establishment. (pp. 52-54 Tr.)

On October 18, 1901, the petitioners filed, (pp. 57-59 Tr.), a paper styled a Bill of Revivor, praying in the alternative that the suit might be revived so as to admit as complainants, heirs of certain of the petitioners named in the original and amended petitions, or that the Court should order that the suit might be prosecuted by the survivors for the benefit of themselves and of the heirs of those deceased. The United States demurred to this (pp. 56-60 Tr.,) but the demurrer was overruled, (pp. 60-62 Tr.,) and an order made that the survivors from time to time of the petitioners might prosecute for the benefit of all the heirs concerned. Thereupon the United States filed a plea to the bill of Revivor (pp. 62-64 Tr.,) which upon motion (p. 65 Tr.) of the petitioners was stricken from the files. (p. 66 Tr.)

The United States then moved (p. 66 Tr.) to strike from the files the amendment to the petition filed December 14, 1878, which motion was denied. (p. 67 Tr.)

Following the permission of the Court, the United States on May 1, 1903, filed an answer (pp. 67-81 Tr.) to which petitioners filed a general replication on May 29, 1903. (p. 81 Tr.)

After a reference to a master to take the testimony, and his report to the Court, a final hearing was had. As a part of the testimony introduced by the United States, was an original grant from Cienfuegos to John Forbes and Company, identical in form and substance with the exemplified copy relied upon by the petitioners, except that the dates of certain proceedings, including the date of the decree of the Captain General in the original differed from the same proceedings in the exemplified copy relied upon by petitioners. It was evident that the dates upon the original had been altered, and that this exemplification had been taken from the original after its alteration. This being the situation, the petitioners prayed an amendment to the petition (p. 106, Tr.) stating their reliance on the grant shown by the proof of the United States. This amendment was allowed. The exemplified copy showed the date of the grant to have been January 10, 1818, and the original introduced and proved by the United States showed it to have been February 20, 1818.

The Court on December 5, 1904, made a final decree (pp. 107-109 Tr.) finding the grant valid and confirming

the title in the petitioners. Thereupon the United States moved that the amendment which had been allowed, but which had not been filed, should be filed *nunc pro tunc*, which motion was granted, and the United States filed an additional answer (p. 111 Tr.) to which the petitioners filed a general replication.

Testimony was subsequently taken by the master as to the number of acres of land in the territory included in the grant which had been sold to the United States and which remained unsold. Upon his report (p. 112 Tr.) to which the United States excepted (p. 115 Tr.) but which was confirmed (p. 118 Tr.) the Court made a decree fixing the number of acres of land in the grant disposed of by the United States at One Million, One Hundred and Ninety Thousand, Four Hundred and Ninety-five and 45-100 (1,190,495.45) and the number of acres undisposed of (excluding certain unsurveyed lands and uncompleted homesteads and unapproved swamp land selections) at Seventy-nine Thousand, Six Hundred and Eighty-one and 49-100 (79,681.49) acres, and decreed petitioners to be entitled to patents for these last mentioned lands and land script, under the Act of June 22, 1860, for the first mentioned number of acres.

ARGUMENT.

(Throughout this argument the numbers in brackets following U. S. Supreme Court citations refer to book and page of Lawyers Co-operative Publishing Company's Edition.)

This court is without Jurisdiction.

The appeal is direct from the District Court to this court.

While the act of June 22, 1860, under which this suit is brought, authorizes an appeal direct from the District Court, yet, it is clear that since the judiciary act of March 31, 1891, the appellate jurisdiction of this court is to be found only under the provisions of that act.

The Paquete Habana, 173 U. S. 685;
United States vs. Rider, 163 U. S. 132.

If there be any jurisdiction, then, it is to be found in the

5th paragraph of the 5th section of the act of March 31, 1891, as follows:

"Appeals * * may be taken from the district courts * * direct to the Supreme Court in the following cases * * .

5. In any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question."

There can be no pretense that the constitutionality of any law of the United States is in this case drawn in question, but we infer from the 9th assignment of error (p. 133 Tr.) that the appellant contends that the validity or construction of the treaty of February 22, 1819, between Spain and the United States is in question,

A review of the record shows that neither the construction or validity of the treaty was involved below or is involved here.

In the original petition the claimant relied upon the act of 1860, (pp. 10 & 12 Tr.) but stated that the 8th article of the treaty protected the grant, the confirmation of which was sought and which was alleged to have been made on January 10, 1818, that is, within the time permitted by the treaty for the making of grants which were to be recognized by the United States.

The petitioners evidently did not know when the petition was filed that the date of the grant had been altered from the 20th of February, 1818, to January 10, 1818, and that the exemplification proved before the United States Land Commissioners of Florida, upon which the petition was founded, did not give the correct date.

The United States, however, pleaded the alteration, and alleged that the grant had been made on February 20, 1818, and proved this fact by introducing the original grant in evidence.

Thereupon, the petitioners asked for and obtained leave to amend the petition by adding thereto the words,

"That the grant (heretofore correctly described in this petition, except as to date) to the lands described in this petition, and to which petitioners claim title and upon which they rely, was made by the Captain-General of Cuba on February 20, 1818, and has been altered so that it purports to have been made on January 10, 1818." (p. 106 Tr.)

Considering this amendment as made, the court decreed,

upon the claim of petitioners, that the grant was made on February 20, 1818. (p. 107, 108 Tr.)

It will thus be seen that not only was the decree not founded upon a claim of a right under the treaty of 1819, but upon a direct repudiation of the treaty, for the treaty annulled all the grants made after January 24, 1818, and the complainants deliberately and solemnly amended so as to show that the grant was made after that time, and, therefore, that no right could be claimed by them under that treaty.

This court has held, under the quoted provision of the act of March 31, 1891, that in order that this court may have jurisdiction, because the construction or validity of a treaty is in question,

(1) "a right, privilege or immunity *dependent* on the treaty

(2) must be so set up or claimed

(3) as to *require* the Circuit Court to pass on

(4) the question of *validity* or *construction* in disposing of the right asserted."

Muse vs. Arlington Hotel Co., 168 U. S. 431.

Applying the test of this case, there is no jurisdiction in this court, for

1. There is no right asserted by the petitioners *dependent* upon the treaty, but the right is entirely independent of and in fact inconsistent with the provisions of the treaty. The petitioners rely entirely on the provisions of the act of June 22, 1860, by which a right to have confirmation of the grant, though made after the dates fixed in the treaty, is conferred, and by which the policy of the United States, as indicated by the treaty, is entirely changed. (See our argument on this point under assignments of error 7 and 8.)

Even if the grant in fact had been made by Spain within the time limited in the treaty, its efficacy would not have *depended* upon the treaty within the rule mentioned, for it would have been protected without the treaty, and could not be said to be dependent upon it.

Muse vs. Arlington Hotel Co., 168 U. S. 436.

2. Not only do we now allege that we do not set up or claim any right under the treaty, but, as we have shown, we amended the petition so as not only to fail to make any reliance on the treaty but in fact, to negative such reliance.

Upon the issues thus made, the case was tried and the decision rendered, and of course there was no issue which could be made as to the construction or validity of the treaty.

3. This being true, the court below was not *required*, to pass on any question affecting the treaty, for it was eliminated by the pleadings as a ground for recovery by the petitioners.

Even if there had been an assertion of a right of protection under the treaty, there was also the question of the enforceability of the grant under the provisions of the act of 1860, and there is absolutely nothing to show that the court was required to pass on any question connected with the treaty, or that it did not rely entirely upon the act of 1860. On the contrary, that it did adjudicate the grant to be valid under the act of 1860, and not under the treaty, is incontrovertibly shown by the fact that it adjudicated it to be made at a date when the treaty would have made it null and void.

4. Nor, in disposing of the right asserted, could the court enter upon the question of *construction* or *validity* of the treaty. Under no contention raised by either side, could either of these questions come before the court.

No one has ever questioned the validity of the treaty, and assuredly neither of the parties to this controversy has ever done so. Nor is there any controversy between the parties as to the construction of the treaty. The utmost that the United States has contended is, that by the terms of the eighth article of the treaty, this grant, made after January 24, 1818, was null, but the petitioners freely admit this and hence there is no controversy between the parties and no question on the record as to such construction.

The United States did contend below that the 8th article of the treaty was applicable to this grant, because the act of 1860 did not apply to it, but it is evident that this contention does not involve the validity or construction of the treaty, but the validity and construction of the act of 1860.

It might also be said that the contention of the United States involved the *applicability* of the treaty to this grant, and hence, gave the court jurisdiction, because a question would then arise as to a right under the treaty. The statute, however, does not give the court jurisdiction, when the question of the *application* of the treaty is involved.

Congress has, in the cases of treaties, only permitted inquiry by this court by direct appeal into the question of construction or validity, and carefully distinguished them from cases arising as to the constitutionality, in which jurisdiction is given by the 4th paragraph of the 5th section of the act of 1891, when the construction or *application* is involved.

The treaty is not even in the chain of title under which the petitioners rely, for the grant does not depend for its efficacy upon the treaty, but upon the act of 1860. Without either the treaty or the act, the petitioners would have had a vested, perfected right by virtue of the grant itself, although it might have been unenforceable without legislation by Congress. Even if, however, it had been a part of the chain of title that would not have been sufficient to give the court jurisdiction, unless it directly and not incidentally, involved the construction of the treaty.

DeLamar's Nevada, etc. vs. Nesbitt, 177 U. S. 523.

The simple essential fact is that the treaty plays no part in the determination of the case. If there had never been any treaty, the rights of the petitioners would have been the same, and in the presence of the act of 1860, the existence of the treaty does not lessen or impair that right.

Even from the standpoint of the United States, the treaty is not more material. It is true that by it the United States acquired from Spain the land in question, (if not previously granted,) and it is true that the treaty annulled the grant in question, but it is also true that both these effects are conceded by everybody and that it requires no inquiry into either the validity or construction of it to determine the effects, and, therefore, there is nothing upon which to predicate the jurisdiction of this court

Of course the mere assertion of the United States of a contention on its part, which no one controverts and which did not enter into the decree below, can be no foundation for any jurisdiction of this court, for there must be a *bona fide* contention, the determination of which was necessary in the decision of the case. To change a little the application of the decisions of this court, there must be color for the assertion and the right must be substantially drawn in question.

New Orleans vs. Louisiana, 105 U. S. 336;
Iowa vs. Rood, 187 U. S. 92;
Sloan vs. United States, 193 U. S. 614.

First Assignment of Error.

This assignment of error (p. 132 Tr.) is as follows:

"The Court erred in making the decree of May 8, 1901, restoring to the files of the District Court papers claimed to be copies of the original files in this case." By this we understand that the assignment alleges error because of the Court's re-establishing the lost files and records.

The argument below was, and probably will be here, that the petition was uncertain and defective, that the evidence did not justify the Court in making the order and that the re-establishment should not have been made, because of the delay in applying for it. To this we answer:

1. The petition is not defective.
2. The discretion of the Court in re-establishing the papers and prceedings will not be reviewed by this Court. If it should be reviewed, however,
3. The evidence fully justified the making of the order; and
4. There was no delay which precluded the petitioners from securing the relief asked.

This Court will not review the order of the Court below re-establishing the lost files and records, and if it reviews, will not reverse.

1. The petition was not defective ,since it complied strictly with the Statutes (Sections 899-903 Rev. Stat. as Amended by Act of January 31. 1879, 20 Stat. at L. 277.)

It is only necessary to make the allegations prescribed by Section 900 of the Revised Statutes, and this was done.

2. The re-establishment was in the discretion of the Court below, and the order of re-establishment will not be reviewed.

Cook vs. Burnley, 11 Wall., 672-676.

But if reviewable, the order will be sustained, for,

3. The evidence fully justified the making of it.

All that was required was that the Court upon a hearing should be satisfied of the truth of the statements of the application, and if so satisfied, to make an order of re-establishment.

The Court perforce was satisfied of the truth of the

statements in the petition, because the United States did not deny them, (See its answer, p. 47 Tr.) and they therefore stood proved.

Hart's Executor vs. Smith, 20 Fla., p. 63

The United States having consented to be sued, is bound by the rules of pleadings, including that which holds what is not denied as admitted to be true.

The United States vs. Darrington, 146, U. S., 338 (36-100;)

Farrar *et. al.*, vs. U. S., 3 Peters, 459 (7-24.)

But if not admitted, it was amply proved by the very best evidence attainable, which was all that was necessary.

That there had been a suit was conclusively shown by the United States Records. (pp. 50-51 Tr.) They also show the general nature of the suit. (*Ibid.*) That the suit was still pending, if it had not been admitted by the United States, was conclusively to be presumed, there having been no evidence offered that it had been dismissed.

P. W. & B. R. R. Co. vs. Howard, 13 Howard, 307-332.

The records of the Solicitor of the Treasury and Mr. Janin's docket are corroborative upon this point. (p. 30 Tr.)

Upon the existence and accuracy of the copies of the originals sought to be re-established, the evidence was peculiarly strong.

There was no evidence adduced by the United States and the testimony of the petitioners was full and complete.

William McCabe, a member of the bar of this and the Florida Courts, of high standing in Canada and well-known in Florida, produced copies made by him of the burned files and gave a satisfactory and convincing account of the reasons which caused him to make and preserve these copies. (pp. 35-46.) The character, abilities, habits, early labors and handwriting of the witness, and the circumstances under which the copies were made were personally known to the District Judge.

The copies produced are on file in the District Court. Their very appearance is convincing as to their genuineness. They are wholly in the handwriting of Mr. McCabe. The language used and the facts set forth could never have been the product of imagination. If it were possible to suppose a willingness to fabricate such papers, it remains

true that when produced the witness must have expected that he would have been met by duplicates in possession of the Government.

The District Judge after a painstaking examination of witnesses in the presence of the District Attorney, by him subjected to cross examination, upon evidence taken down as given, the Judge interrogating the several witnesses, scrutinizing the manner of each on the stand, with the great advantage of personally seeing the intelligence, candor, accuracy and truthfulness of each, and deliberately weighing the testimony as spoken, and afterwards presented in writing, assisted by the critical analysis of the District Attorney, found and after mature deliberation and ample opportunity for rebutting testimony, announced himself satisfied that the copies in the handwriting of William McCabe and by him produced were genuine copies of the burned files of this case.

It is true that McCabe was an interested witness. That fact only affects the weight of his testimony. The corroborative facts which sustain him are conclusive. The petition signed by Steele by its peculiar style proves its genuineness. The order of Judge Settle reserving to the United States the benefit of the Statute of Limitations is proof that the copies speak the truth and the whole truth.

Proceedings to restore lost or burned records of Court are informal and the circumstances of each case govern the degree and character of proof required. Generally from the nature of the proceeding slight evidence, and that of the lowest grade has been held sufficient to maintain an application to restore. The following cited cases and text-writers sustain this rule.

McKean, C. J., in Morris Lessee vs. Vandreen, 1 Dall., 65;
Winn vs. Patterson, 9 Peters, 677;
Weatherhead's Lessee vs. Baskerville, 11 How., text, 360;
Burton vs. Driggs, 20 Wall., 125 (22-302;)
Renner vs. Bank, 9 Wheat., 581;
Ruggs vs. Tayloe, 9 Wheat., 483;
Rich vs. Rock Island, etc., 97 U. S., 694;
Inhabitants of Stockbridge vs. Inhabitants of W. Stockbridge, 12 Mass., 400;
Mobley vs. Walls, 98 N. C., 284;

Pruden vs. Alden, 34 Am. Dec., 51;
Jackson vs. Hammond, 1 Caines Rep., 496;
Tomlinson vs Funston, 1 Green, (Iowa) 544;
Lyons vs. Gregory, 3 H. & M., 237;
Cook vs. Wood, 1 McCord Rep., 139;
Green vs. Stevens, 2 Duv. (Ky.,) 420;
Jackson vs. Cullum, 2 Blackf. (Ind.,) 229;
U. S. vs. Britton, 2 Mason, 468;
Goetz vs. Kochler, 20 Ill. App., 233;
Harris vs. McRae's Admr., 4 Iredell, 81;
Keen vs. Jordan, 13 Fla., 335;
2 Phil. Ev., 351; (4 Am. Ed.) Note 376;
Comyns Dig., Evidence A., 3;
1 Green, Ev., Sec. 509.

Revised Statutes Sec. 773 and Instructions to U. S. Attorneys, etc., p. 125, Sec. 4, require that the United States be annually advised of the reasons for the delay which existed and the record shows (Page 50, the Letter of the Solicitor of Treasury to J. N. Stripling, Esq., District Attorney, dated Feb. 15, 1901,) that the Government was advised annually of the pendency and continuance of suit until the fire burned the Court House in A. D. 1891.

4. There was no delay which precluded the petitioners from securing the relief asked.

No delay would be a bar to re-establishment, because the Statute (Sec. 900 Rev. Stat.) does not so provide. The Congress evidently contemplated that any question of delay or laches should be raised otherwise than in this proceeding.

The answer of the United States suggests that the delay in the prosecution of the suit before the destruction of the records and the delay in instituting the proceedings for re-establishment after their destruction, should have prevented the re-establishment. It is difficult, however, to see how a delay in the prosecution prior to the destruction can affect the right to re-establish. There is nothing before the Court in these proceedings except the questions specified in the Statutes, *i. e.*, the existence, the loss and the accuracy of the copies. The Court cannot consider anything affecting the merits or the right to final relief. Moreover, there is no evidence before the Court of the progress of the proceedings, until the papers are re-established, for until that time, there are no records or files by which the Court can be informed of the progress or status of the case. Even if

delay in any case would bar a re-establishment, it would not do so unless it appear that by the delay some evidence pertinent to the re-establishment has existed and has been lost during the delay. There is no pretense of any such loss.

Nor could the delay affect the right, if it be explained so as to shut out any finding of negligence on the part of the petitioner. Here there can be no finding of negligence, because while the destruction of the records was known, the existence of any copies thereof and probably the existence of any information from which the contents of the lost records could be supplied, was not known, until shortly before the institution of the proceedings for re-establishment. The copies were in the hands of McCabe, but his interest had ceased, as we shall clearly show, because of the adverse decision in the Dow case (mentioned below,) and the parties to this suit did not know of his possession of the copies.

The following statement of the facts, showing the status of the parties before and after the destruction of the records, will show that there was no negligence on the part of the persons interested in this suit. These facts were established before the Court, both by testimony and by certified copies from the Dow case, and have been omitted from the printed record here because not necessary to be considered by this Court.

The petition was filed on the 3rd of March, A. D., 1875. The original petition was signed and verified by Alexander T. Steele, Esq , as Solicitor for the petitioners. The United States appeared and, as shown by the record still remaining in that Court, moved to dismiss the petition, because, as alleged, it was not properly verified. This motion appears on the motion docket of that Court, signed by John B. Stickney, attorney, dated May 5th, 1876. In A. D. 1878, the petitioners, by Judge Archer Cocke, as their Solicitor, asked leave to amend their petition, by making the descendants of Forbes' two partners, James and John Innerarity, parties. The amendment was allowed by order of Judge Settle and the amendment made.

Mr. Stickney was appointed District Attorney about 1876. Prior to his appointment he had been associated with William McCabe as counsel in the State Court on behalf of the heirs of the former partners of Forbes in the

original firm of Panton, Leslie and Company against the administrator of Forbes' estate, in which a decree was rendered May 20th, 1878, for over two million dollars. After his appointment as District Attorney, Mr. Stickney withdrew as counsel from the suit in the State Court, presumably because of his official duties in connection with the suit at bar. (Page 35 Tr.)

The title of the case in the State Court was Thomas Dow, *et. al.*, vs. Venancio Sanchez, Admr. of John Forbes. (23 Fla. 441.)

Soon after the rendition of the decree in the State Court, Mr. Edwin Janin, as counsel for petitioners, took charge of the litigation in both the Federal and State Courts. Recognizing that any recovery had in the suit at bar would inure to the plaintiffs in the suit in the State Court under their decree, Mr. Janin caused to be brought in the State Court a Bill of Review to set aside the decree rendered therein. Leave to file the Bill of Review was granted upon terms, a copy of which was read at the hearing before the District Judge and filed herein, (page 35 of Tr.) by which it appears that the claimants under John Forbes in the suit at bar were required to file in the District Court, in this suit, and in the State Court, a stipulation that they would not dispose of any recovery had in the suit at bar, nor attempt to encumber or part with the same, for ninety days after the final adjudication of the suit in the State Court. Petitioners in the suit at bar being widely scattered, many in number, including women and infants, it was manifestly impossible to comply with the order of the Court in the Dow case, and it became imperative, if anything was to be preserved to the heirs of Forbes to arrange a postponement of the trial of the case at bar for confirmation of the Grant, until on appeal there could be a reversal of the decree in the Dow case. This Mr. Janin seems to have arranged, as the annual reports made by the District Attorney to the Solicitor of the Treasury up to 1890 show that the case at bar was regularly "continued." The Dow case was appealed and in the latter part of 1887 the Supreme Court reversed the decree of the Circuit Court and dismissed the suit. See Sanchez, Administrator, etc. vs. Dow *et. al.*, 23 Fla., 445, read in evidence before the District Judge on the proceeding to restore the record, (p. 35 Tr.)

When by the reversal of the decree in the Dow case it

was again possible to proceed in the pending suit in the District Court for confirmation of the Grant, all the counsel in the case were dead except Mr. Janin and he was stricken with paralysis, from which he never recovered. His death occurred May 17, 1891. In May, 1891, the Court House at Jacksonville, with all the records and files in this suit, was burned.

It appears in evidence that about 1898 the widow of Mr. Janin learned that William McCabe, of Toronto, Canada, possessed valuable and necessary data relating to this suit. Mr. McCabe testified that in order to intervene in this suit he had made copies of the pleadings in the case, which he had preserved. The stipulation required to be made by the heirs of Forbes by the order in the Dow case shows that Mr. McCabe was depending on the recovery in the suit at bar to make good his decree in that case. Mr. McCabe testified that he refused to allow an inspection of his copies and he only produced them under process from the District Court. Whatever the motives that prompted him, the fact remains that these copies were long unknown to exist and when their existence was discovered were then inaccessible to the parties interested, until produced before the District Judge, A. D. 1900. There is no evidence that by any degree of diligence petitioners could have obtained earlier the information or the copies.

The delay was explained to the satisfaction of the District Court. Such part of the evidence as the personal knowledge possessed by the Judge of the several witnesses and of the local events cannot be brought before this Court. It appears on the record that of the numerous petitioners, many lived in foreign countries, that they ceased to be represented by counsel from the death of Mr. Janin, almost co-incident with the destruction of the records, until their present counsel was employed. There was no attempt to show that present counsel have not been diligent in instituting or carrying on the present proceedings, or that the delay was other than that enforced by circumstances.

Second Assignment of Error.

This assignment (p. 132) is as follows:

"II. The Court erred in over-ruling the demurrer to the Bill of Revivor herein."

This Court will not review the order of the Court below permitting the survivors to prosecute the cause for the benefit of all the heirs of John Forbes, James Innerarity and John Innerarity, and if it reviews will not reverse.

1. The making of the order was discretionary with the Court below and will not be reviewed by the Court.

2. The order did not affect the rights of the parties in anywise, for, as we shall show under assignment *four*, even without such an order the Court would have declared the title good, even though there was only one petitioner before it, and would have left the several co-owners to adjust their interests.

3. The demurrer was only to one branch of an alternative prayer and was, therefore, bad.

4. The making of the order permitting the survivors to prosecute for the benefit of all the heirs was in accordance with law.

5. The defense of the Statute of Limitations to this bill if permissible should have been by plea and not by demurrer.

6. The defense of the Statute of Limitations was not sustainable upon the facts stated in the bill and shown by the record.

1. The making of the order in question was discretionary with the Court below and not appellable. It was an amendment by petitioners defining the representative character of the petitioners, *i. e.*, adding new parties and orders permitting said amendments or in fact any amendments to pleadings are not subject to review by this Court.

Richmond vs. Isom, 121 U. S. 46.

2. We refer to the argument hereinafter made under assignment *four*.

3. The bill was in the alternative, containing a petition that the survivors be allowed to prosecute the suit to a decree for the benefit of all interested. It averred that from the nature of the act of June 22, 1860, the death of any one of the petitioners abated the suit only as to the person deceased, and that the surviving petitioners were competent to continue the suit to a decree. The prayer was that the surviving petitioners be directed to prosecute

the suit to a decree if the Court should determine that the nature of the case and the statute rendered them competent to call for its decree; otherwise, that the suit, in respect thereof abated, be revived. The demurrer was only to one branch of the alternative prayer and was properly overruled.

Western Ins. Co. vs. Eagle Fire Ins. Co., 1 Paige, 284;

Verplank vs. Caines, 1 John Ch. p. 57 and cases cited, p. 59;

F. S. Ry. Co. vs. Hill, 40 Fla., 1.

4. The making of the order permitting the survivors to prosecute for the benefit of all concerned was in accordance with law and the course of equity courts.

Since the Court below made an order permitting some claimants to prosecute for themselves and all others, it is unnecessary to discuss the question as to whether an order of revivor would have been proper and hence whether a demurrer to the alternative prayer for revivor was well taken.

The order actually made was proper.

"A Court of equity had unquestionable authority to apply its flexible and comprehensive jurisdiction in such manner as might be necessary to the right administration of justice between the parties."

Mr. Justice Swayne in Seymour vs. Freer, 8 Wall., 202 (9-312.)

Where the parties are too numerous to be brought before it, it is an admitted ground for the Court to cause the form of the bill to be altered by making the plaintiff sue on behalf of himself and others.

1 Dan'l. Ch. Pr. p. 422, (Ed. 1865.)

The necessity for the formal petition for such relief arises out of the law;

That as between the parties who have been before the Court in the formal petition, it is necessary that the survivors shall ask permission formally to continue the suit as survivors.

Brown vs. Story, 2 Paige, 594:

And that up to the filing of the petition of revivor, there has been by the parties to the formal petition no distinct declaration that the suit is to be prosecuted for the benefit of all others not parties but having a common interest. It is

perhaps necessary that this should appear, but it can be made to appear by amendment at any time even up to final hearing:

Richmond vs. Irons, 121 U S. 46.

The petition for revivor was an offer to so amend and the order by the Court made on the petition was an allowance of the amendment.

The *purpose* of the request, among other things, was to obviate the necessity of bringing in numerous parties and of filing frequent bills or petitions for revivor consequent upon frequent changes in interest by death, marriage, etc.

This grant was made in 1818, eighty-four years ago. It was shown that the grantors have had many descendants, and that those descendants have multiplied greatly, and that there existed of those known to petitioners a number requiring three-quarters of a page of type-written matter for their enumeration. Some of these were of age and married, as shown by the original petition, in 1875 when it was filed, and were therefore when the amendment was made past middle age and any one or more of them might die at any moment, involving the necessity of innumerable bills of revivor with the consequent delay.

The communication required for the obtaining of the information necessary for such revivors, would be endless in work and time, for the petition for revivor shows that the parties known to the petitioners resided in the four quarters of the globe, Cuba, Maryland, Texas, Pennsylvania, Spain, France, Louisiana, London, Liverpool, New York, Mississippi, Virginia, California and Florida.

The necessity of a prosecution of a suit by representation of the many by the few is well shown by this Court in the following language:

"Where the parties interested in a suit are numerous, their rights and liabilities are so subject to change and fluctuation by death or otherwise that it would not be possible without very great inconvenience to make all of them parties, and would often-times prevent the prosecution of the suit to a hearing * * * * * legal and equitble rights and liabilities of all being before the Court by representation and especially when the subject matter of the suit is common to all, there can be very little danger but that the interests of all will be properly protected and maintained * * * * * it is manifest that to require

all the parties to be brought into the record as is required in a suit at law would amount to a denial of justice. The right might be defeated by objections to parties from the difficulty of ascertainment, or if ascertained, from the changes constantly occurring by death or otherwise."

Smith vs. Swormstedt. *et. al.*, 16 How., 302;
U. S. vs. Old Settlers, 148 U. S. 480.

There could be no objections to parties not joined coming in by intervention before or after decree if they could have originally joined. It is not and cannot well be denied that all could have joined in the original petition:

Harlan, J., in Osborne vs. Wisconsin Cent., 43 Fed. 824;
Tilford vs. Henderson, 1 A. K. Marshall, 483:
Scrimeger vs. Buchanon, 3 A. K. Marshall, 219.

It is true that in this case each party has a distinct title, for they all claim as tenants in common, and tenants in common have no unity of title. There is, however, community of interest and the question is common to them all —the validity and enforceability of the grant,—and this is sufficient. This Court in the case in 16 Howard just cited, says that representation of many by the few is allowed,

"Where the parties are very numerous, even though they may have separate and distinct interests, yet it is impracticable to bring them all before the Court. In this latter class, though, *the rights of the several persons may be separate and distinct*, yet there must be a common interest or common right which the bill seeks to establish or enforce."

The Court cites many cases of such common right which are analagous to these.

The Court uses the words "common interest or common right," but not the words "unity of interest or right," and elsewhere in the same opinion, shows that it means that the complainants must have "an object common to them all," or as Story puts it, the "question" must be "one of common interest:"

Story's Eq. Pl, 97, 98, 99, 103, 107, 110, 111, 116, 120;
Hallett vs. Hallett, 2 Paige 15.

Judge Nelson cites many cases and declares that the representation is permissible when "although there may not be any privity between the numerous parties, there is a

common title out of which the question arises and which lies at the foundation of the proceedings."

Cutting vs. Gilbert, 5 Blatch., 259, 261; Federal Cases No. 3559;

Approved in Scott vs. Donald, 165 U. S. 116.

The parties had a common right, though their interests were separate. Hence the order allowing the survivors to prosecute to a decree was in harmony with the announced practice of equity courts.

Smith vs. Swormstedt, 16 How., 302 text 303;

United States vs. Old Settlers, 148 U. S. 480;

Scott vs. Donald, 165 U. S. 116, citing Cutting vs. Gilbert, 5 Blatch, 259-261, Fed. Cases 3559;

Seaman vs. Slater, 18 Fed. 485;

Cushing, J. in Penhallow vs. Doane's Admr. 3 Dall. 118;

West vs. Randall, 2 Mason p. 181 & 189 text;

Mr. Justice Harlan in Osborne vs. Wiscon. Cent. etc., 43 Fed. 824;

Hallett vs. Hallett, 2 Paige, 15;

Gainer vs. Gainer, 30 W. Va., 402;

Tilford vs. Henderson, 1 A. K. Marshall, 483;

Meux vs. Waltby, 2 Swan., 281;

Hale vs. Hale, 146 Ill., 258;

Lilly vs. Tolbein, 102 Mo., 477;

Story Eq. Pl. Secs. 97 to 99, 103, 107, 110, 111, 116, 120, 357, 365, 369;

Mitford Chancery Pr., Secs. 58, 59, 61, 79, 167, 96, 76, 120;

Barton's Suit in Equity, p. 134.

The precise question is passed upon by this Court in the case of a proceeding like this where the heirs of Cirilo de Morant "as well in behalf of the interests of the heirs of Louis Doquemil de Morant and those of Laurent Millaudon as for themselves" (page 339.) The record shows that the heirs of these three parties were co-tenants, holding under the same title claimed to have been granted by Spain, and this Court, upon the objection being made that the "alleged claimants do not represent the whole title to the land claimed," disposed of the contention by saying (page 343,) "we perceive no reason why a part owner or the heirs or representatives of a part owner should not have the benefit of the proceeding, even if the present

petitioners do not show title to the entire interest in the land."

United States vs. Morant, 123 U. S. 335, 339, 343.

This case forecloses this question in our favor.

Of course, all parties for whom the suit is brought or continued may intervene, but if they do not, their interests will be protected in the final decree; or they may come in under it and take advantage of it.

"A court of equity adapts its decrees to the necessities of each case, and should the present suit terminate in a decree against the defendants, it is easy to do substantial justice to all the parties in interest, and to prevent a multiplicity of suits by allowing other distributees either through reference to a master, or by some other proper proceeding, to come in and share the benefit of the litigation."

Payne vs. Hook, 7 Wallace, 425 and citations;
West vs. Randall, 2 Mas. 181; Fed. Cases No. 17424;
Story's Eq. Pl., Sec. 89 and following;
Lockhart vs. Horn, 3 Woods, 542; Fed. Cases, No. 8446.

Thus, in this case the Court did not confirm the title to be in the petitioners (less than the whole number of claimants) nor award to them the scrip which would be issued under the act under which this proceeding is brought (Sections 6 to 11, act of 1860, 12 Statutes at Large, page 85,) but decreed "the claim valid, just and binding" "according to the principles established in the act" (Section 11,) and left the settlement of the respective rights of the heirs or representatives of the grantees in the land remaining unsold by the United States and in the scrip representing the lands sold for future determination:

Authorities Supra;
U. S. vs. Old Settlers, 148 U. S. 480;
Wabash, &c. vs. Beers, 2 Black, 448.

5. The defense of the Statute of Limitations was not properly raised and, hence, not available.

If the facts justifying it had appeared upon the face of the petition the defense might have been raised by demurrer, but no such facts so appeared.

If the right to recover against the United States was personal property, then the right to revive would accrue only to an executor or administrator and the statute would

begin to run only when the letters testamentary or of administration were issued. It follows, necessarily, that in such case, if the bill did not state the time of the grant of the letters, a demurrer because of the lapse of time since they were granted would not lie, but that the only way of getting the statute before the Court would be to plead it and the plea would have to state the time elapsed since the appointment of the legal representative.

Perry vs. Jenkins, 1 Mylne & Craig, 122;
Coit vs. Campbell, 82 N. Y. p. 513;
Gunton vs. Carroll, 101 U. S. 426, (25-986;)
Story's Eq. Pl, 831.

If the right to recover from the United States was real estate, then it descended to the heirs, and the right accrued at the moment of the death of the ancestor.

The bill of revivor, however, did not allege the date of the appointment of personal representatives, nor the date of any deaths of ancestors, and hence there was no point of time before the Court from which it could begin to calculate the running of the statute, or to begin to predicate laches because of delay.

If the defendant had made the defense by plea, then upon an issue joined upon it, the petitioners would have been able to put in evidence all the circumstances showing reasons and excuses for delay,—an opportunity which would have been denied to them if the Court had sustained the demurrer.

In Deloraine vs. Brown, 3 Brown's Ch. Cases, 646, Lord Thurlow held that "the defendant has not the right to avail himself by demurrer of an inference of fact upon matter which a jury in a Court of law could collect matter of fact to decide their verdict, or (matter on which) a Court would proceed in the same manner in equity. That limitation of time will bar a suit, where there is no positive limitation, or under what circumstances the lapse of time ought to have that effect, must depend upon the facts of the particular case, and the conclusion must be an inference of fact, and not an inference of law, and therefore, cannot be made on demurrer."

Brooks vs. Gibbons, 4th Paige, 375.

6. The defense of a loss of right by the lapse of time was not sustained by the facts shown on the bill or record.

A. It was a matter of indifference to the United States

whether the suit was or was not decided in favor of petitioner, except in so far as it was interested in seeing that no unfounded claims should be successful.

This is not an adversary suit. As a result of the treaty of 1818 between Spain and the United States, the latter became owner of all the public lands not granted away by Spain. It became a matter of importance that there should be a separation of the private from the public ownership. Such separation, however, would take much time, and in fact, acts providing for it have been passed from time to time from 1822 to 1860. During the period required for separation the United States did not desire that all its domain should be tied up, but it asserted title to everything, providing, however, for the compensation of such legal claims as it might trespass upon by such assertion and by any disposition of lands consequent upon it. It thus constituted itself a trustee for the true owner, and declared that it did not intend to claim any lands as its own absolutely, except those not granted to private individuals, and that as to this, its acts should not be construed as being adverse. The proceedings then authorized by Section 11, act of 1860, were not adverse proceedings to wrest from the Government property claimed by it, but proceedings authorized by the Government in its own court, as its own instrumentality, for the purpose of ascertaining the truth, and not for the purpose of hostile assertions.

U. S. vs. Boisdori, 11 How. 88;

Barry vs. Gamble, 3 How. 57.

The resort to the courts was the equivalent of its alternative (section 11,) that is, the resort to Commissioners provided by the other sections of the act, and it cannot be contended reasonably that the statute of limitations would run in a proceeding commenced before the Commissioners. The policy of Congress with reference to this class of cases has been often recognized and announced by this Court. In the language of Mr. Justice Field "they (the United States) have not desired the tribunals to conduct their investigations as if the rights of the inhabitants to the property which they claim depended upon the nicest observance of every legal formality. They have desired to act as a great nation, not seeking in extending their authority over the ceded country to enforce forfeitures, but to afford protec-

tion and security to all just rights which could have been claimed from the Government they superseded."

U. S. vs. Auguisola, 1 Wall., 352;

U. S. vs. Arredondo, 6 Peters, 746.

This Court has frequently recognized the fact that the United States is a trustee for the owners of lands under Spanish and other grants and, in its determination of the rights of claimants it will not regard itself as hostile to them, but merely as endeavoring to ascertain the truth of the matter. (See Argument under Assignment of Error numbered Four.)

B. No injury has resulted to the United States from the delay in having the order permitting some to prosecute on behalf of others made, because:

The character or quantum of proof required to be made was in nowise changed by the order. The same measure of proof would have to be made by a single petitioner as by all the claimants, for in both cases, so far as the United States was concerned, the only question was whether the grant had been made and was enforceable under the Act of 1860, and no more proof would have to be made whether there was one or more petitioners.

There was and could be, by reason of the delay, no loss of evidence pertinent to the case. The original grant was filed in Judge Brackenridge's Court and remained there accessible to the United States from 1830 to the time of its use by the United States in this suit. In like manner all the proceedings of that Court were available to and have been availed of by the United States, as the proceedings before the Land Commissioners and all the various copies of the grants filed from time to time in the Government Archives have been and are at all times public records and were not subject to loss, nor have they been lost. In short, the whole case depends upon documentary evidence which affirmatively appears to be as fully in existence now as at any past time.

All the proofs are documentary and by the treaty with Spain were placed in the custody of the United States, and there remain. Spanish land titles in Florida are not like California titles, where the original title papers or "espediente" seem to have been given to the claimants, the Government retaining a register or index, "a record of petitions presented and grants made." At any rate, the

titles in Florida were not such as might be fabricated. Here the "registro," "protocol," or "matriz" was and is retained in the Archives of the Sovereign, first of Spain, then the United States, to whom it was delivered by Spain. When the Act of 1860 was passed all titles which could be presented under the Act were in possession of the United States and had been, for thirty years, and the lands had been forty years in possession of the Government. There could be no injury to any rights possessed by the United States in allowing proof of ownership to be made at any time, in all proceedings begun within the time limited by Congress.

Penn. Mut. Life Ins. Co. vs. Austin, 168 U. S. 685, (42-626;)

Galliher vs. Cadwell, 145 U. S., 368 (36-736.)

On the other hand, the delay has been of such serious prejudice to claimants that it must have been forced and unavoidable. Not to mention the great prejudice arising from death of the original parties and counsel, when this action was begun there were 471,172 acres of the Grant undisposed of. At the date of the final decree all but 79,681 acres had been disposed of by the United States. The indemnity certificate allowed by the act certainly cannot have the value of these lands, located as they are, and every year of delay has greatly injured petitioners while the United States has been unaffected.

Mere delay would not prevent or deter the Court from making the order.

The objection that petitioners were dilatory in reviving their suit after its abatement having been presented, by *argument*, on *demurrer*, there is nothing before the Court but the sole fact that nine years elapsed after death of counsel and destruction of the records before revival was sought. Without knowledge of any of the circumstances, upon this bare fact, the Court is asked to deny petitioners a right to show this valuable grant to belong to them, and to declare that these lands belong to the United States, contrary to the expressed policy of the legislative branch of the Government. Congress has admittedly acted with a commendable desire to do justice in these cases, but the fact remains that it delayed more than thirty years before granting petitioners a right to make proof of their title, meantime excluding them from possession.

Under Sec. 955, Rev. Stats., laches cannot be predicated

upon delay, as no time is prescribed, and because the other party can always compel prosecution. The Norway, 1 Benedict, 493. An equity case comes within the purview of this statute. Mr. Justice Story in Clarke vs. Mathewson, 12 Peters, text p. 172. Not mere lapse of time but change of situation during neglectful repose constitutes such laches as to defeat a right.

O'Brien vs. Wheelock, 184 U. S. text p. 493;
Nelson vs. Carrington, 4 Munf. (Va.) 332-342 (6 Am. Dec. 524;)
Wood on Limitations, Sec. 59, p. 119 (Ed. 1883.)

And when applied to a bill of revivor relating to lands there must have been a holding under claim of title adverse to the complainant for a period of time which at law would bar a remedy.

Elmendorf vs. Taylor, 10 Wheat, 176;
Shorter vs. Smith, 56 Ala. 208.

The limitations upon a writ of right was twenty years, or eleven years more than the delay shown in the case at bar.

Rhode Island vs. Massachusetts, 15 Pet., text 273;
Wood on Limitations, Sec. 36, p. 74, Sec. 59 p. 118, (Ed. 1883.)
Story Eq. Pl., Sec. 831.

Since mere delay is not sufficient to bar these rights there must have been some injury to the opposite side, or the facts must raise the presumption that the complainants had abandoned or released their claim.

There is absolutely no ground for presumption that petitioners had abandoned their claim after suit was instituted.

Where the facts and circumstances outweigh the presumption that the right has been abandoned the doctrine of laches has no application.

Townsend vs. Vanderwerker, 160 U. S. text, p. 186;
Wood on Limitations, p. 124-125 (Ed. 1883;)
12 Enc. Law, p. 533, p. 558.

C. The United States has failed to object to delay. It could, at any time, have moved to require the revivor of the suit or a petition such as was filed here, and it cannot complain when it could, at any time, have pursued the remedy which it had and did not pursue.

The Norway, 1 Ben., 173.

It has also acquiesced in the delay. The reports of the District Attorney from 1876 to 1890, which were made to the Department of Justice, (p. 50) show the cause to have been "continued" annually from 1876 to 1885.

The record thus establishes that by direction of the Court and with the sanction of the several District Attorneys and the Department of Justice this suit has been annually continued from 1875 until about the time fire burned the files and records. Having consented to the delay while the petitioners were able to proceed, certainly the United States must be held to have consented that a reasonable time for the procuring of the necessary facts and authority to restore the record and put the bill into shape to prosecute should be allowed. Certainly such consent should be implied from silence and failure to object, the conditions having changed by destruction of the records.

"Parties may agree to anything in reference to a suit, and having agreed it does not lie with them to complain."

Pacific, R. R. vs. Ketchum, 101 U. S. 289 (25-936.)

The record proves that up to A. D. 1885 the United States did agree to annual continuances. Until A. D. 1888 the pendency of the Dow suit was sufficient cause for the delay to prosecute this suit. The destruction of the records and death, with previous incapacity of counsel, followed hard on the reversal of the decree in the Dow suit. Upon a proper issue made petitioners would have been able to have satisfied this, or any Court that the nine years which elapsed after the Court House was burned before they established the burned records was not such a delay as charges them with laches. The testimony shows that only by mere accident and the zeal and persistency of the widow of the survivor among the early Counsel was there discovered the existence of the copies necessary to make such restoration of the record as would enable petitioners to proceed in their suit. If this discovery was made materially before the active prosecution was begun and pressed, that fact is unknown to counsel. No opportunity has ever been given to place in the records the important and interesting facts concerning the discovery that William McCabe was in posession of information and copies which would enable a restoration of the burned records, and why none of the claimants themselves were able to obtain this information.

Not having adopted the orderly practice prescribed, and either moved for a dismissal of proceedings for want of prosecution, or, at the proper time pleaded facts constituting grounds why the action should not be further prosecuted, the United States at all times having information as to the status of the action, and its representative always in Court, is equitably estopped from refusing to receive the proffered proof of title.

Equitable estoppel is founded on justice and fair dealing. "Its object is to prevent an unconscientious and inequitable assertion or enforcement of claims or rights which might have existed or been enforced by other rules of law."

Ricard vs. Sears, 6 A. & E., 469; 11th Eng. Ruling Cases, p. 78;
2 Pomeroy Eq., Sec. 902.

The facts, together with the history of the legislation of Congress show that the lapse of time in bringing to a judicial determination the claims under these grants was a matter of no interest to the United States. By a series of acts, beginning 1822 and ending in 1872, it threw its Courts open to the claimants. At the time of the passage of the last act more than fifty years had elapsed since any right of any claimant could have accrued and in fact rights of claimants in Louisiana had accrued more than seventy years. So it is conclusive that the United States had no fear that undue advantage to the claimants or injury to it would arise from the lapse of time after the vesting of the title in the claimant, and it surely could not complain at a delay after bringing of the suit and a delay inconsiderable in comparison with the delay which it, by its various acts of legislation, had declared to be no bar to a successful prosecution of a claim.

This Court has construed the principles which govern it in similar cases, as requiring that liberality be shown where parties come clearly within the terms of the statute, even if dilatory.

In the case of U. S. vs. Heirs of Clarke and Atkinson, 16 Peters, 228, after answer filed in 1830 a petition to revive was allowed on July 16th, 1840, a longer time than is complained of in the case at bar.

In the case of United States vs. Lawton, suit was begun in 1829, death of claimant suggested in 1834, and revivor

unsuccessfully attempted, and Bill of Revivor allowed in 1841, nearly eleven years after answer filed.

5 How. pp. 11-12.

E. In the High Court of Chancery, the practice of which prevails in this Court, there is no limitation against a bill of revivor.

Coombs vs. Jordan, 22 A. D., 274.

"The pendency of another suit is sufficient to avoid the plea of laches in failing *to institute a suit.*

Lawrence vs. Trustees, 2 Denio, text p. 585;

Pacific Ry. vs. Mo. Pacific Ry., 111 U. S. 505.

Much more should it be sufficient to justify failure to prosecute a pending suit.

Continued recognition of title is of like effect.

Seymour vs. Freer, 8 Wall., 202 (19-312,)

Waddell vs. United States, 25 Ct. Claims, p. —;

Sprujer vs. Sprujer, 114 Ill., 553;

Jackson vs. Horton, 126 Ill., 569;

Callender vs. Colegrove, 17 Conn. 1."

The Government made no attempt to contest the facts which entitled petitioners to revive. In such case revivor is of course. Under Eq. Rule 56 revivor is a matter of right where no cause why the suit should not be revived is shown by the other party.

Terry vs. Sharon, 131 U. S. 40 (33-96;)

Fretz vs. Stover, 89 U. S. 198 (22-789;)

Bettes vs. Dana, 2 Sum., 383; Fed. Cases 1368;

Mason vs. Hartford, etc. Ry., 19 Fed. 56;

Newcombe vs. Murray, 77 Fed. 493;

Wilson vs. Codman's Extx., 3 Cranch, 207;

Pendleton vs. Fay, 3 Paige, 204;

Story Eq. Pl., Secs. 364-377;

2 Danl. Ch. Pr. p. 1624 (3rd Am. Ed. 1865;) p. 1491 Note 2, and Sec. 1509, (6 Am. Ed.)

Third Assignment of Error.

This assignment (p. 132 Tr.) is as follows:

"III. The Court erred in granting the motion of the claimants to strike from the files the plea of the defendant to the Bill of Revivor."

The plea is on pages 62-64, Tr., the motion to strike on page 65, and the order striking on page 66.

The court did not err in its order striking the plea of the defendant to the bill of revivor, and this court will not review the correctness of the order.

1. The order striking the pleading was discretionary with the court below, and the appellate court will not review it.

2. The defense sought to be availed of in this place was the same insisted upon by the United States in its motion (p. 66 Tr.) (Fourth Assignment of Error,) to strike the amendment filed December 14, 1878, to the bill, to-wit: That the amendment introduced new parties after the time allowed by the Act of 1872 and after the right of said parties was, therefore, barred, and the defendant thus in a due and orderly proceeding obtained the benefit of the matters irregularly sought to be set up in this plea.

3. The plea was filed August 27th, 1902. The bill of revivor had been finally disposed of July 5th, 1902, by an order made thereon that the prosecution of the suit should thenceforward be by the survivors of the parties named in the amended petition. The Bill of Revivor was thereafter *functus officio*. No pleadings were then before the Court except the petition filed in 1875 and the amended petition filed by leave of the Court in 1878, and the original suit had been determined not to have abated.

4. The plea while attempting to contest the validity of the amendment to the original petition allowed by Judge Settle on Dec. 14, 1878, prayed judgment whether respondent should make further answer to the bill of revivor. The attempt to set up by plea a defect in the amended petition was not matter which could have been pleaded to a bill of revivor, if that bill of revivor had still been undisposed of.

"The general doctrine is that objection taken to an original bill, or which might have been taken, cannot again be made upon the bill of revivor, where the original suit has abated upon the death of the plaintiff. The only questions which can be raised are whether the party in whose name the revival is asked, has succeeded to the interests, rights or claims of the deceased, or has become the legal representative of his estate, so as to enable him to continue the prosecution of the suit, if not already deter-

mined, or to revive it so as to force a judgment of the suit if not already executed"

Mr. Justice Field in Sharon vs. Terry, 36 Fed. Rep. 346;
Fretz vs. Stover, 22 Wall., 198 (22-770;)
Slack vs. Walcott, 3 Mason, 508; Fed. Cases 12932;
Bettes vs. Dana, 2 Sum. 383; Fed. Cases 1368.
2 Barb. Ch. Pr. p. 52.

5. The plea was "to the whole" of the bill of revivor and hence contested a revival by the parties named in the petition as originally filed in 1875, but it attacked the amendment only, in which are named both the original parties and their joint owners, who had been brought in as parties by the amendment in 1878. If the plea were pronounced good, the only order which could have been entered on it would have been an order dismissing the whole proceeding, that is the original petition, not attacked by the plea, as well as the amended petition. Not being a bar to all the relief asked in the amended petition the plea is bad.

Milligan vs. Milleage, 3 Cranch, 220;
Piatt vs Oliver, 1 McLean, 295, Fed. Cases 11114;
Story Eq. Pl. Sec. 693, Note 4, (Ed. 1870.)

If the matter set up by the plea had been properly pleaded and to the proper pleading, appellees would have met it. Pleaded as it was to the Bill of Revivor already disposed of, the orderly course of practice required that it be struck from the files.

Fourth Assignment of Error.

This assignment (p. 132 Tr.) is as follows:

"IV. The court erred in denying defendant's motion to strike the amended petition from the files."

The amended petition is on page 5, the motion to strike on page 66, aud the order denying the motion on page 67.

The original petition was filed under the Act of Congress of 1860, (12 Statutes at Large, page 85,) and the amendment thereof passed June 10, 1872, (17 Statutes at Large, page 378,) which permitted the filing until June 10, 1875. It was filed by the heirs of John Forbes, who relied upon a grant of the King of Spain to John Forbes & Co., and who asked the confirmation of the grant to them. The petition alleges that the grant was made to John Forbes, but the

description of the grant, and the exhibits and recitals of the petition show that the grant relied upon was the grant to John Forbes & Co. It was filed on March 3, 1875, within the time allowed by law.

After the time allowed for filing an original petition, an amended petition was filed December 14, 1878, by the heirs of John Forbes, and the heirs of John Innerarity and of James Innerarity, alleging that the grant to John Forbes & Co. was to a co-partnershtp, composed of John Forbes, John Innerarity and James Innerarity, and asking that the rights of the Innerarityes be recognized in the final decree.

The amendment brought into the suit the heirs of James Innerarity and of John Innerarity, who constituted the "Company" of the firm of John Forbes & Company, and who were hence tenants in common of the lands claimed in the suit.

The motion to strike was founded upon the idea that the amendment constituted "a new and different suit upon the ground * * * * * that the same was not instituted and filed within three years from the 10th day of June, 1872, as required by law."

This court will not review the order of the court below in refusing to strike the amendment permitting the heirs of James Innerarity and John Innerarity to be formally made parties to this suit, and if it reviews will not reverse the action.

1. The allowing of amendments to pleadings is discretionary with the lower court, and the court will not review the allowance.

The decisions upon this point in this court are too numerous for citation, but as especially applied to applications by new parties to intervene, see,

Credit's Com. Co. vs. United States, 177 U. S. 117.

And the rule is applied even to the extent of a refusal to review the action of the court below, substituting one new sole plaintiff for one original sole plaintiff.

Chapman vs. Barney, 129 U. S. 677.

2. The court did not err in refusing to strike the amendment because,

a. The amendment merely put in formal shape what

would have resulted without it, since the persons made formal parties by it, would have obtained the same relief if it had not been made.

b. It was proper and admissible, even though filed after the expiration of the time allowed by the Act of 1860, as extended in the Act of 1872.

A. The counsel for the United States in the Court below contended that the amendment altered the cause of action in two respects:

The changing in the petition of the description of the grant relied upon from a grant to John Forbes to a grant to John Forbes & Co., and the introduction of the heirs of James Innerarity and John Innerarity as new parties.

As to the change of reliance upon a grant to John Forbes & Co , instead of upon a grant to John Forbes:

The original petition does allege that the grant sought to be confirmed was made to John Forbes, but the petition in itself, shows that this was a mere clerical error, and that the grant of which confirmation was sought was the grant to John Forbes & Co. This is shown beyond peradventure, by the fact that the petition sets forth in its body the metes and bounds by United States Survey, and the date of the grant, and annexes as a part of it, the report of the Land Commissioners at pages 94 to 96, 4 American State Papers, and the plat of the grant in controversy. The report of the commissioners deals only with the grant of the same date, by the same Governor, of the same land, made to *John Forbes & Co.*, and the plat shows the same land, with the same boundaries, and recites that it is the tract of land granted on the same date to *John Forbes & Co.*

Mr. Steele, who drew the original petition, probably knew nothing of the grant, except what appears in the American State papers, and from these title papers, it appears that the grant was made upon the petition to the Captain General of John Forbes alone This fact, or the fact that the legal title stood in the name of John Forbes, in trust for himself and his partners, may have led counsel to present the petition in the name of the legal representatives of Forbes alone and to have alleged that the grant was to *John Forbes.*

The only difference then, between the formal allegation of the petition and the grant actually described and relied upon, is that the former states the grant to be made to *John*

Forbes, while the latter relies upon a grant made to *John Forbes & Co.*

It is clear, however, that the petitioners intended to rely upon some grant, and that they did intend to rely upon the grant to John Forbes & Co., which was the only grant set forth.

The variance between the formal allegation and the description was apparent upon the face of the petition. If there was any uncertainty, and the defendant had any doubt as to what grant the petitioners relied upon, it could have moved to cause the petitioners to make the petition certain, but it cannot be heard after the limitation has expired to say that the petition relies unambiguously upon a grant which does not exist The mistake of allegation was purely clerical, is too clear for argument, and is amendable at any time.

This court in a strongly analogous case, allowed recovery of land at Miami River, upon a petition which described the grant as land at New River.

United States vs. Delespine, 15 Peters, 326.

As to the introduction of new parties:

It is too clear for citation of authority that equity will permit parties to be added for the purpose of presentation of their interests in the subject matter of the litigation. If this is done with the consent of the complainant, it is effected by means of an amendment to the bill. If without the consent of the complainant, it is effected by intervention. As to interventions, the Supreme Court of Florida has said:

"A party having a beneficial interest in the decree sought to be obtained, has a right to intervene by petition filed for that purpose at any stage of the proceedings."

Robertson vs. Baker & Macrae, 11 Fla. 192.

The Innerarity heirs are vitally interested in the decision to be reached on the question of validity of the grant, and have a right to be made parties.

"Where it appears on the face of the bill that there are others, creditors or legatees, who are entited to a ratable distribution with the complainants and who have a common interest with them, such others should be made parties to the bill, or suit should be brought by complainants on behalf of themselves and all others standing in similar situation, and it should be so stated in the bill. The objec-

tion might be obviated by amendment as was done in Good vs. Blewit, 13 Vesey, 397."

Egberts vs. Wood, 24 Am. Dec. text p. 238.

The amendment correcting the mistake in alleging that the grant set out and on its face appearing to run to the partnership, was to John Forbes alone, and then bringing in all the parties which the grant as set out showed were interested therein was a matter of course under Rule 28, if, as we contend, no new cause of action against the United States was thus introduced.

It is competent in equity to so amend the bill as to make even an entire new state of facts and to rely on the whole case made by the original and amended bill, because the original still remains of record and forms part of the case.

Hunter vs. the United States, 5 Peters. 173, text, 182;

Hall vs. Fisher, 3 Barb. Ch. 637.

An amendment is proper where the original parties show an interest in themselves which entitles them to invoke the jurisdiction of the Court, but the judgment or decree would not be complete without the intervention of another party, who would represent all others who have a similar interest.

The rule in England is declared to be that leave to amend a pleading ought never to be refused unless the Court is satisfied that the party is acting *mala fide*, or that his blunder has done some injury to the other side that cannot be compensated.

Bramwell, L. J. in Tildesley vs. Harper, 10 Ch. Div. 393, Vol. 2, English Ruling Cases, p. 780.

It may be allowed in the Court of Appeal, if there found necessary to let in the whole merits of the case.

Lewis vs. Darling, 16 How. 1, text, p. 8.

No new cause of action was introduced:

This is shown by the decisions of this Court defining the position to the United States in this class of cases.

The cause of action in the original petition was a determination of the validity of a grant to John Forbes & Co. So long as that cause remained unchanged, it makes no difference to the defendant who the parties asserting its validity are, if they are *bona fide* claimants, and hence the addition of one or more claimants does not make a new cause of action as against the defendant.

The position of the United States in the litigations respecting these foreign land grants is a peculiar one. While a defendant, it is not an adversary to the plaintiff. Under the eighth article of the treaty with Spain, all valid Spanish grants remained confirmed, and the United States as the successor of Spain, had only the function of ascertaining what grants were valid. The 11th section of the Act of 1860, required the court to "decide the grant valid, or invalid," and decree accordingly. Separating its private interest from its higher duty as the protector of the beneficiaries of Spain, the United States, through this court at once took position that it was of no moment what interested person brought the claim before the court. It would consider the question of title, and if found valid, confirm it for the benefit of whom it might concern. It imposed but one limitation upon the right to invoke the action of the court, and that was that the invoker should have an interest in the grant, and not be a mere interloper. Applying this limitation, it refused to confirm a grant at the instance of a person who had parted with all interest in it.

U. S. vs. Watkins' Heirs, 97 U. S. 219.

Or to confirm a title set up by one person on behalf of another with whom he showed no connection:

U. S. vs. Innerarity, 19 Wallace, 595

But while thus protecting the courts, it has displayed the broadest liberality in confirming the whole of grants at the instance of persons shown to be interested therein, but not to be owners of the whole, thus:

Persons interested in the claim before the court were allowed to employ the name of the original claimant in proceedings to establish the grant:

U. S. vs. Sutter, 21 Howard, 170.

In this claim, the claimant had alienated almost the whole of the grant, and this objection was made, but the court confirmed it for the benefit of all concerned.

The court approved the form of a decree in favor of one man for the benefit of whom it might concern in this class of cases, in

McMicken vs. U. S. 97 U. S. 204.

The court confirmed a grant to all the co-tenants upon the petition of one co-tenant:

U. S. vs. Morant, 123 U. S. 343.

The precedent was established in Perchman's case, 7 Pet. 51.

"The primary object of the act * * * * was to distinguish the vacant and public lands from those which were private property, and for this purpose, an inquiry into pre-existing titles became necessary * * * * The *mesne* conveyances were also required * * * * simply to enable the Board to determine if there was a *bona fide* claimant before it under a Mexican grant, and so this court has repeatedly declared that the government had no interest in the contest between persons claiming *ex post facto* the grant;"

U. S. vs. Sutter, 21 How. 170;
Castro vs. Hendricks, 23 How. 438.

"A decree in this form (in favor of one man for the benefit of whom it might concern) is often made against the government in these land cases when the title is satisfactorily established and the parties presenting it connect themselves with it so as to show some real interest to be protected."

Castro vs. Hendricks, 23 How. 438;
Brown vs. Brackett, 21 Wall. 387.

"But a mere stranger to the title can hardly ask the court to go to that length. It is not for every one who chooses to take up the prosecution of such claims without any connection whatever with the title sought to be established."

McMicken vs. U, S. 97 U. S. 204.

An amendment in a petition defective in substance was permitted, after the limitations had eqpired:

U. S. vs. Delespine, 15 Peters, 328.

The court says:

"Although the first petition was informal and *defective in substance*, still it would be too strict to say it was not the commencement proceeding, but that the amendment allowed by the superior court should be taken as the date when the claim was first preferred."

"The tribunals of the United States * * * are concerned only with the validity of the grants as they came from that (a foreign) government, and were not interested in any derivative title from the grantees further than to see that the parties before them are *bona fide* claimants under the grants:"

Brown vs. Brackett, 21 Wallace, 387.

In U. S. vs. Patterson, 15 How. 10, the claimant failed to connect himself with the original grantee for want of proof of a power of attorney. This Court said: "The operation of the judgment will be to perfect the title for the benefit of the legal representatives of William Barr" (the original grantee whose heirs attempted to convey.) The form of the decree was "it is the opinion of this Court that the grants set forth in the record are valid grants, and so much of the decree of the District Court as confirms them should be affirmed for the use of the legal representatives of William Barr, deceased."

The case of U. S. vs. Morant, 123 U. S. 335, before referred to was one in which the heirs of one of the co-tenants petitioned "as well on behalf of the interests of two others as themselves" (text p. 339,) and in U. S. vs. the Heirs of Clarke and Atkinson, 16 Peters, 228, the petition was in the name of Clarke "for himself and the legal representatives of George Atkinson, deceased," on a grant made to Atkinson, and though no title whatever was shown in Clarke, this Court in that, as in the Morant case, sustained the decree over the objection that petitioners did not represent the true owners of the lands.

In the Buyck case, the petition was in the name of Ann Buyck, widow of Augustus Buyck, and the "*unknown heirs of said Buyck.*"

Buyck vs. United States, 15 Peters, 215.

These cases demonstrate beyond question that if there were even one *bona fide* claimant before the court, the court considered the proceeding as one *in rem*, the *res* being the property granted. In analogy to all other proceedings *in rem*, parties not before the court in the beginning, could intervene for the protection of their interests, and even though they did not intervene, if the court was advised of their existence, it would administer the funds so that the decree should be for the "benefit of all concerned." This being so, the question of parties was, "with the limitation above mentioned," entirely subsidiary, for the cause of action was an entire thing,—the property and title placed in the jurisdiction of the court by the first proper invocation of its authority, and remaining there until the final disposition of it.

The *res* and title thereto in the case at bar were brought into court by the petition, filed in 1875, and remained there

until final decree. Who will be on final decree in this court, are now, or were in 1878 or 1875, the legal representatives of the three grantees designated in the grant as John Forbes and Company, is of no moment to the United States.

The manifest purpose of the suit as it related to the grant of lands in West Florida was to have a determination, as between the older title of the grantees and the junior title in the United States, whether there had been made by competent authority a complete grant of the tract of land located in the Territory of Florida, beginning at a point opposite the mouth of Sweetwater Creek on the Apalachicola River, and running due West to the Choctawhatchee River and embracing all the land between the two rivers, from that point South to the Sea, while Spain had the actual possession of the Floridas, so that these lands were not a part of the public domain ceded by Spain to the United States in 1820. In other words, whether these lands were or were not such public property of the King of Spain as passed title to the United States at date named in the Act of 1860, namely, the date when the United States received possession of West Florida.

The amendment of 1878 made no change in the subject matter of the suit instituted by the heirs of Forbes in which they erroneously alleged that Forbes owned the land at his death, (1823.) Their request is to be allowed to correct their mistake of averment and to be allowed to place on record their admission of a co-tenancy with the representatives of the partners in the firm of John Forbes & Co. as to the same tract of land which they had brought before the Court to be adjudged not the property of the United States.

The amendment was in fact unnecessary, as upon the title set out, a grant to John Forbes and Company, the legal ownership was in John Forbes as in the petition alleged, it was unnecessary to aver upon what trust he held it.

A grant to J. and Co. vests the title in J. for himself and in trust for his partners in proportion to their several interests.

Seymore vs. Freer, 3 Wall. 202;
Cross vs. Sabin, 13 Fed. Rep. 308;
Moreau vs. Saffarans, 3 Sneed, 595;

1 Wash. Real Prop. 574;
3 Wash. Real Prop. p. 241, (Ed. 1868.)

The trustee was competent to sue alone.

Van Vetchen vs. Terry, 2 John Ch. 197;
Hopkirk vs. Page, 2 Brock p. 20, No. 6697 Fed. Cases;
Mitchell vs. U. S. 9 Peters, 733;
Ely vs. U. S. 171 U. S. 220 (43-150;)
U. S. vs. Kingsley, 12 Peters, text, p. 485;
U. S. vs. Hanson, 16 Peters, 196 (10-935;)
U. S. vs. Forbes, 15 Peters, text, p. 182;
U. S. vs. Mitchell, 15 Peters, 89;
Henshaw vs. Bissell, 18 Wall. 255 (21-838;)
U. S. vs. Fossatt, 21 How. 446;
U. S. vs. White, 23 How. 249 (16-561.)

Where Chief Justice Marshal says, "All persons having a distinct interest, must undoubtedly be brought into court; but where the interest of one person is involved in that of another, and that other possesses the legal right, so that the interest may be asserted in his name, it is not always necessary to bring both before the Csurt. * * * * * The person having the equitable interest, if the suit be not really brought for his benefit, may insist upon being made a party and the court will direct it, etc."

Without amendment, proof of title to John Forbes & Co. would have been received on the averment that Forbes was the owner.

"If the objection to the deed is that it conveys only an undivided interest, while the declaration claims the whole tract the objection ought not to have been sustained."

Ch. Justice Marshall in Doe vs. MacFarland, 9 Cranch, text, p. 153.

No attempt was made to strike out or in any other respect alter the statements of the original petition as to the lands in controversy. That the representatives of Forbes, the holder of the legal title in trust for his partners, sought confirmation of the whole grant to the firm of John Forbes and Company, in no way prevents them from naming the representatives of the partners and admitting them on the record before the decree rendered. Their right to share in the result could not be denied and hence they were properly admitted to prosecute. The alteration of the averment of the petition that the particnlar grant of the particular

lands described and sued for was to the firm and not to Forbes personally, was consistent with the facts pleaded in the original petition when the whole is looked at. Whether the granted lands were held in trust or not did not concern the United States. In either case the land was severed from the public domain and became private property.

Mr. Justice Wayne in U. S. vs. King, 7 How. text, 893.

As deciding also the indifference of the United States to the question as to who the claimant of these land grants may be, and its concern only with the question whether the land was separated by Spain from its public domain before July 1, 1821, see,

Mitchell vs. U. S. 9 Peters, 733;
Ely vs. U. S. 171 U. S. 220 (43-150;)
U. S. vs. Kingsley, 12 Peters, text, p. 485;
U. S. vs. Hanson, 16 Peters, 196 (10-935;)
U. S. vs. Forbes, 15 Peters, text, p. 182,
U S. vs. Mitchell, 15 Peters, 89;
Henshaw vs. Bissell, 16 Wall, 255 (21-838;)
U. S. vs. Fossatt, 21 How. 446;
U. S. vs. White, 23 How. 240 (16-561),

Not only, however, do the decisions of this court relating peculiarly to the class of cases under consideration, show that the original petitioners could have continued the prosecution of the suit for the benefit of the co-tenants, and hence that the amendment added nothing to the rights of the contending parties and subtracted nothing from the rights of the United States, but the same doctrine is clear upon general principles, and upon authority, for the suit is in the nature of an ejectment suit, in which one co-tenant can sue for the whole common property and recover it in his own name, but for the benefit of himself and his co-tenants, and of course being partly for their benefit, they can intervene and represent their own interests.

Proceedings under this act are declared to be substantially an ejectment proceeding:

Scull vs. U. S. 98 U. S. 410.

And in ejectment proceedings, a tenant in common may sue for the whole tract, and upon recovery, will hold it for himself and his co-tenants:

Poole vs. Fleeger, 11 Peters, 185;

Moody vs. Johnson, 112 N. C. 546; 17 S. E. 579;
Newman vs. Va. etc. 80 Fed. 228;
Pierson vs. Grice, 6 La. Ann. 232.

Here Forbes' heirs are co-tenants of Innerarity heirs, and having claimed the whole property, they would if adjudicated to them have held the excess over their own share for the benefit of their co-tenants. In fact, the court could, upon its appearing that there were others interested, have so framed its decree as to conserve such interests:

Authorities *supra*.

See also the following from this Court:

"If this bill had been prosecuted, as originally framed, to final decree, and had resulted in the recovery of assets of the bank applicable to its purposes, it would necessarily have been made to appear during the progress of the suit that there were other creditors of the bank equally entitled with the complainant to share in the fruits of the litigation. The relief that would have been granted in such circumstances would have been by means of a decree distributing the assets obtained, equally among all the creditors, including the complainant, who, in respect to such assets, would have been entitled to no priority, either by virtue of having reduced his claim to judgment or by reason of having first filed a bill to enforce the trust."

Richmond vs. Irons, 121 U. S. 27.

In United States vs. Morant, 123 U. S. 343, there was a petition by one part owner of land granted for a confirmation under the statute of 1860, and the court says:

"We perceive no cause why a part owner or the heirs or representatives of part owner should not have the benefit of the proceeding, even if the present petitioners did not show title to the entire interest in the lands."

This being true, it was a matter of course for the court to permit such other part owners to come in and represent their interests.

And this court says that an amendment changing the parties will be allowed when the liability of the defendant is not increased.

The Beaconsfield, 150 U. S. 312.

b. If we have shown, as we think that we have, that the heirs of John Forbes could, without amendment, have procured the confirmation of this grant for themselves and for the heirs of the Innerarity's, and hence that the admis-

sion of the Innerarity's into the suit did not make any new cause of action, then it necessarily follows that they could be admitted as well after as before the time limited in the Act of 1872.

If an original suit is begun before the statute of limitations runs, the addition of the new party after it has run may or may not be admissible, according as the introduction of the new party does or does not create a new cause of action against the defendant. The newness of the party is entirely unimportant. If he asserts a new right, independent of, and not connected with that asserted by the original party, the defendant can plead that such new right was not asserted within the time limited by law, but if a new party comes into a suit for the purpose of presenting an interest in a right or claim in the matter in controversy already set forth and claimed in the suit by a person with whose asserted interests his interest is connected, then he introduces no new cause of action, and the defendant cannot plead the statute as against him. The authorities which we will cite will show this to be the rule.

We, however, are not dependent upon general reasoning, for there are authorities directly in point, and many controlling analogous ones. We cite and quote some of them.

This court has decided the question directly.

On the 23nd of May, 1829, Clarke filed a petition, in his own name, for himself and the heirs and legal representatives of George Atkinson, deceased, claiming a right under Atkinson to——acres of a grant made to Atkinson by Spain in 1816. The Government answered May 21st, 1830. Clarke having died, in July, 1840, his heirs filed a petition to revive the suit, which was granted, and the cause came on for hearing. At the hearing counsel for claimants "then moved the Court that the cause might proceed in the name of Philip R. Young" and others, "heirs and legal representatives of George Atkinson." "No deed or conveyance or evidence of any kind was offered to show that either Clarke or his heirs had any interest whatever in the land." On the ground of want of interest when he instituted the suit and also because the time limited by the Act of Congress for the commencement of the proceedings had expired before the heirs of Atkinson were made parties, the Attorney General contended that the Court was without jurisdistion. Mr. Justice Catron, especially familiar with these

cases, and before whom many had been tried when on the Circuit in Missouri, delivered the opinion of the Court in which all the contentions of the Attorney General were overruled.

U. S, vs. heirs of Clarke and Atkinson, 16 Peters, 228.

The ground of objection here is identical with the second objection made by the Attorney General in the case last cited and if the case was of small magnitude it might well be rested upon the decision announced therein.

The following cases are exactly analogous in principle.

"Suit was originally brought in the name of M. Becnel only, who sued as the sole owner of the land, and claimed the whole damage for the trespass. It subsequently transpired that Lezin Becnel was an undivided co-owner of the land, and he thereupon filed an intervention alleging the fact, and joined in the demand."

This was filed after the statute of limitations had expired, and that fact was pleaded. The court says:

"If the plaintiff had recovered, it would have inured to the joint benefit of the co-owner who would have compelled him to account. The action clearly indicated to defendant the entire cause and object of the claim and the title on which it was founded, which is sufficient to interrupt prescription as to both the co-owners:"

Becnel vs. Wagnespack, 40 La. Ann. 109; 3 So. Rep. 536.

A suit brought on a note before the bar of limitation is complete, will inure to the benefit of one intervening after the time when, but for suit begun, the claim would be barred:

Foote vs. O'Roork, 59 Tex. 215.

The court says:

"The intervenors do not assert a new cause of action but only claim an interest in the cause of action already asserted against the defendant."

A co-plaintiff was added by amendment after the statute had run. The court says:

"The defendant contends that by this amendment a new and different cause of action is to be tried. This is not the effect of the amendment. The amendment permits a party interested as co-plaintiff in the identical claim presented to the Commissioners to enter and prosecute. The cause

of action is restricted to the claim presented before the Commissioners to the same extent it would be if the amendment were not allowed. The claim is not enlarged or changed by reason of the amendment."

Wyman vs. Wilcox' Estate, 63 Vt. 487; 21 Atl. 1103.

The court decided that a wife was a tenant in common with her husband in certain real estate, and must join in an action with him for injury to it. A suit was brought by the husband alone and after the statute of limitations had run as to the wife, she was made a party plaintiff by amendment.

The court said;

"The statute (of limitations) will be no obstacle to prevent an amendment which will merely complete a cause of action which is substantially disclosed from the pleadings:"

Vunk vs. Raritan, &c. 56 N. J. Law, 395; 28 Atl. 593.

"An amendment within the power of the Court to allow is not the beginning of a new action so as to subject the suit to the operation of the statute of limitations which was not a bar at the time of instituting the action."

Guild vs. Parker, 43 N. J. Law, 43.

Action by one partner on a partnership debt. Plea of the existence of the partnership. Plaintiff was permitted to amend after the statute of limitations had run by adding the other partners.

Dixon vs. Dixon, 19 Iowa, 512.

Suit in the name of the assured in an insurance policy. After the limitation had elapsed, the mortgagees for whose benefit the policy had been made were added by amendment:

The court said:

"There is no just ground for the claim that by reason of the amendment making new parties plaintiff there resulted any change in the cause of action. The object of the suit after the amendment was precisely the same as it was before, viz., to recover the amount of the policy on account of the destruction by fire of the insured premises, and so far as we can see, assuming there was a right of recovery at all, it was and is a matter of total indifference to the company whether the recovery is in the names of the Manns or in the name of Thomas for their use. Had some new

claim or cause of action been introduced into the suit by the amendment, against which the statute of limitation had run, or before the making of such amendment, the position of appellee would be clearly right; but such is not the case."

See also U. S. Ins. Co. vs. Ludwig, 108 Ill. 514, 518, where the court says:

"Defendant was in court, and it was a matter that could make no possible difference so far as it was concerned, whether the judgment was rendered in favor of the parties beneficially interested in the cause of action, or in favor of the party having the legal right to sue, as was done, since the amendment was permitted. It was the same suit and the same claim for which the action was intended to be brought, and the action must be regarded as having been commenced when the original summons was issued, which was in time to save the bar of the limitation clause of the policies as to the time of the commencing of suit or action."

The same court says:

"In this case, the amendment did not make a new cause of action. The claim as originally filed, was for the amounts of certain notes and other property turned over by appellee to Mrs. Dwyer in her lifetime. After the substitution of appellee's name the claim was still for the same notes and property. April 11, 1881, the day on which it was filed, was within the two years. Where no new cause of action is introduced, courts will allow amendments liberally, for the purpose of avoiding the running of the statute."

McCall vs. Lee, 120 Ill. 261; 11 N. E, 522.

If the amendment states such a case as might have been made in the original bill in the alternative, or a case stated as the original bill might have been drawn, making no new party defendant, or new issue of fact or claim, the allegation being varied as to a subject within the *lis pendens*, it does not make a new case, and the Statute will run only to the filing of the original bill.

Winston vs. Mitchell, 93 Ala. 554-9: 9 So. Rep. text, p. 552-553.

In this cited case the original bill alleged defendant to be owner of the land as trustee under a resulting trust and prayed a decree for conveyance. The amended bill alleged that the defendant was owner subject to a lien for part of the

purchase money furnished by complainant and prayed enforcement of this lien. The Court held this amendment only varied the allegations as to a subject matter already in issue to meet a state of facts proved, which authorized relief, and did not make such a new cause of action as to let in the Statute of Limitations.

The cases of Jones vs. Van Doren, 130 U. S. 684, and Brainard vs. Buck, 184 U. S. 99, are to the same effect and the facts are similar. If there is equity in the case when fully stated and correctly applied to the proper parties, an omission of parties or mistake in some fact connected with the substance of the case, but not forming the substance itself, is usually allowed to be corrected by amendment.

Lyon vs. Tallmadge, 1 John. Ch. p. 184.

In Hardin vs. Boyd, 113 U. S. 756 (28-Led.) this Court refused to allow the statute of limitations as a bar to an amendment presenting a new statement of facts, the matters in the original and amended bill having arisen out of one transaction capable of being incorporated originally into one suit. The court says, "the amendment had no other effect than to make the bill read just as it might have been originally prepared."

As shown by the case cited from 93 Ala. 554, the statute becomes a bar only when the amendment introduces new matter or a different cause of action, not within the *lis pendens*, and this is clearly illustrated in the language of Mr. Justice White in a late case in this Court in these words: "The principle is that the running of the Statute is interrupted by the suit and summons so far as the cause of action then propounded is concerned. It interrupts it as to all matters subsequently alleged by way of amendment which are part thereof," that is, part of the cause of action as first presented.

Union Pac. Ry. vs. Wyler, 158 U. S. 287.

There can be no dispute that the cause of action in the case at bar, which was presented by the petition filed in 1875, is whether the lands contained in the grant therein set out and described as made to John Forbes & Co. were private lands at the date when Florida passed from the sovereignty of Spain to that of the United States.

United States vs. Arredondo, 6 Peters, 736 text;
United States vs. Forbes, 15 Peters, 182.

No injury being possible to the respondent, and the matter introduced by the amendment being within the *lis pendens*, or cause action originally presented, the amendment took effect as of the date when the original petition was filed, March 3, 1875.

Richmond vs. Irons, 121 U. S. 27;
French vs. Hay, 22 Wall. 238;
Neale vs. Neales, 76 U. S. 1, (19-591;)
Tremaine vs. Hitchcock, 90 U. S. 518;
Bray vs. Creedmore, 109 N. C. 49;
Lilly vs. Tobbein, 103 Mo. 477; 23 Am. St. Rep, 887;
Penn. Co. vs. Sloan, 24 Ill. Ap. 48-125 Ill. 72;
Sublett vs. Hodges, 88 Ala. 491;
Wood on Lim. 294, (Ed. ;)
1 Danl. Ch. Pr. Sec. 402;
Story Eq. Pl. Sec. 332;
Rule 28 Eq. Rules.

In Lilly vs. Tobbein, above cited, an unincorporated church sued. After the time allowed for bringing action an amendment substituting individual trustees as complainants was made. The Statute of Limitations was pleaded in bar. The Court says, "where the amendment sets up no new matter or claim, but is a mere variation of the allegations affecting a demand already in issue, then the amendment relates to the commencement of the suit, and the running of the statute is arrested at that point * * * There is a vast difference between substituting a competent for an incompetent plaintiff and bringing in a new defendant. Substituting the party having the legal right to sue for the claim for which the action was brought, instead of another party improperly named as plaintiff is not the commencement of a new action, and in such a case the amendment relates back to the commencement of the action," citing United States Insurance Co. vs. Ludwig, 108 Ill. 514.

Whether an amendment constitutes a new cause of action is determined upon the same principles in equity as in law. At law the test applied has been to ask whether a recovery on the original declaration would bar a recovery under the amended declaration.

Davis vs. N. Y. R. R. Co. 160 N. Y. 646.

If it would not, then the amendment constitutes a new cause of action; if it would, the new pleading is an amendment.

Another test is to inquire; 1st, will the same evidence support both the original and the amended declaration; 2nd, will the same measure of damage apply to both.

Unless both these tests fail the new pleading is an amendment and not a new cause of action.

Scovill vs. Glassner. 79 Mo. 449;

Texas & Pacific Ry. Co. vs. Cox, 145 U. S. 593, (36-833;)

Gormley vs. Bunyan, 138 U. S. 623 (34-1089.)

In the case at bar the facts stated in the original and amended petition are based on the same rule or principle of law and that principle is to be applied upon the same transaction or subject matter of the action, namely: the title to the grant to Forbes & Co., which is stated at length in Vol. 4 Am. State Papers, p. 94 *et seq.*

This principle of law which the Court was in each petition called on to apply is to determine whether the lands, the subject matter of the suit, were in fact private property on July 21st, 1821.

While not a case of the introduction of a new party, the case of the United States vs. Heirs of Clark & Atkinson, shows strongly the attitude and liberality of this Court in its application of the limitation to this class of cases.

The record of the case of U. S. vs Delespine shows that the original petition filed in November, A. D. 1830, within the time allowed, relied upon a grant of land made by the Captain General of Cuba at New River, to petitioner's predecessor in title; that at the November Term, A. D. 1835, after the time limited by the Act of May 26th, 1830, for instituting any action for confirmation, the petition as filed was amended to seek confirmation of a grant of lands, made to such predecessor by the Provisional Committee at Havana, situated on the Miami River, twenty-five miles below New River. This Court, upon objection made by the Attorney General, said it would be "too strict" in proceedings of this character to hold that the petition for confirmation of the latter grant should date from the time of the amendment, and refused to apply the statute of limitations even where on the face of the amendment the facts above stated appeared.

See the record in U. S. vs. Delespine, 15 Peters, 326, Case No. 9, Jan. Term, 1841.

For a very instructive case, fortified by numerous per-

tinent authorities as to the allowance of amendments introducing new parties after the statute of limitation has run, and deciding that such amendments would be permitted for the very purpose of defeating the Statute, see,

McDonald vs. State of Nebraska, 101 Fed. (C. C. A.) 178, *et seq.*

Fifth Assignment of Error.

This assignment (p. 132 Tr.) is as follows:

"5. The Court erred in granting the motion made by the claimants, at the hearing of the cause, to amend the petition by adding immediately before the prayer for relief therein the words following, viz., "That the grant (hereinbefore correctly described, except as to date) to the lands described in this petition, and to which petitioners claim title and upon which they rely, was made by the Captain General of Cuba on February 20th, 1818, and has been altered so that it purports to have been made on January 10th, 1818."

The position of the United States in the Court below was that the amendment created a new cause of action, because,

1. The original petition relied upon a grant made on January 10th, 1818, while the amendment relied upon a grant made on February 20, 1818; and because,

2. The original petition based the right to recover upon the treaty of 1819, while the amendment based the right to recover upon the act of 1860. And that,

3. The new cause of action was barred, because introduced into the case after June 10, 1875, the date fixed in the act of July 10, 1872, as the limit for instituting such action.

The order of the court permitting the making of the amendment so that the petitioners could rely upon the grant made on February 20, 1818, instead of the grant alleged to have been made on January 10, 1818, is not reviewable in this court, and if reviewable, was correct and will not be reversed.

I.

The answer in this court to foregoing contentions of the United States are:

a. That the order of the Judge permitting the amendment is not reviewable here;

b. That there was no objection or exception by the defendant to the allowance by the Court, but on the contrary, the allowance was procured by the defendant;

c. That if the defendant had at any time a right to object to the allowance of the amendment, it waived it by pleading over.

d. That even without the amendment the difference in the date of the grant pleaded and the one in proof, would not have been a variance preventing a recovery upon the original grant in proof;

e. That if it would otherwise have been a variance, none can be insisted upon by the United States, for not only did it not object to the introduction of the grant, but it itself introduced it.

f. That a variance does not prevent a recovery unless the defendant has been misled and a fair trial prevented.

g. That no new cause of action was introduced by the amendment, and hence it related back to the filing of the petition and the limitation did not bar a reliance upon the grant embraced in it.

A. The action of the court complained of was a very usual and ordinary case of amendment at the hearing of a bill in Chancery to meet the proof and the settled rule of this court is that orders permitting amendments in such cases are not reviewable here.

Neale vs. Neales, 9 Wall. 1;
Richmond vs. Irons, 121 U. S. 46.

B. No objection or exception was made by the United States in the Court below.

Of course to make an objection to an order available in the appellate court, when such an order is reviewable at all, there must be timely action in the court below.

Clements vs. Moore, 6 Wall. 310-311.

In this case, not only was there no objection by the United States, but it itself procured the allowance of the amendment. The fact is, that it at first consented (p. 105 Tr.) but afterwards withdrew the consent (p. 106 Tr.) There was not, however, still any objection by it to the making of the allowance. but upon the contrary the appli-

cation to amend was, "by consent of the parties," "submitted to the Court." It is also a fact that the amendment was allowed only after formal motion by the United States, upon what it called "suggestion of diminution," (p. 109 Tr.) and since this allowance and the placing of it upon the record by the United States, not for the purpose of objecting to it but for the purpose of being allowed to file an answer to it (pp. 110-111 Tr.) clearly there was nothing to intimate to the court below, or to this court that the amendment was in *invitum* as to the United States.

C. If the United States had any right to object to the allowance of the amendment and the change alleged to have been introduced by it, the objection was waived by filing the answer without any reservation of the objection and thus pleading over.

D. The amendment was unnecessary, for without it, the proof of the Registro of a grant made on February 20, 1818, instead of the grant alleged to have been made on January 10, 1818, would have been admissible, as there would have been no material variance.

It will be noted that such was the view of the court below, for, while it, prior to its final decree, permitted the amendment, yet, no amendment was made and the court without the amendment decreed the grant to be valid, and only thereafter upon the request of the respondent, entered its order *nunc pro tunc*, that the amendment be made. Whether there was or was not an amendment made was entirely immaterial.

If there had been no amendment the result would have been the same, *i. e.*, that the grant would have been admissible as a ground for recovery under the allegation that the grant had been made on January 10, 1818. If there were an amendment setting up a grant of the later date, the question, if properly presented, would arise as to whether the amendment showed a new cause of action and was, hence, a departure; if there was no amendment the question would arise, upon the offer of the later grant, as to whether it showed another or new cause of action and, hence, constituted a variance between the grant alleged and the grant sought to be proved.

There was no material variance, because the grant alleged and the grant proved and relied upon were identical,

except in the matter of dates, which were not by the pleadings made matter of description or substance.

Further it is to be noted that respondents produced the original title papers, proved that they had been delivered by the Government of Spain to the Agent of the United States, and offered them in evidence. This was conclusive evidence against the Government, unless its plea of *res judicata* were sustained.

Cook vs. Barr, 44 N. Y. 158 text.

It is a fundamental rule of evidence that a party is bound by the testimony he places on record in his behalf.

The Government by its own proof at the trial established that Spain had granted the identical lands, to the identical grantees, by a title made forty-one days later than averred by petitioners. The proceedings being authorized by the United States expressly for a determination whether or not there existed a title prior to that made to it by the cession of Florida, when this fact had been proved, though proved by the Government's evidence, the United States cannot refuse to recognize and confirm that title, merely because petitioners alleged it to have been made one month earlier than in fact it was made. The matertal issue,—was this tract of land the private property of Forbes & Co. when the Spanish flag was lowered in Florida—was conclusively proved. Whether the true date of the title papers is January 10th, as altered, or February 20th, as originally signed, is immaterial. In either event the land was not ceded by Spain to the United States, but was owned and possessed by petitioners' ancestors on the 21st of July, 1821. This fact having been proved, both by the authenticated copies of the title papers, and also by the "registro" produced by the Government, certainly the Court will not refuse to decree that the United States by the Act of 1860 are required to recognize petitioners' rights merely because in stating them they alleged that the Captain General made the grant on January 10th, when in fact he made it on February 20th.

"The United States has not submitted this case to her highest court of equity on such grounds as these" * * * * "The proceedings is in equity; according to its established rules our decree must be in conformity with the principles of justice."

U. S. vs. Arredondo, 6 Peters, p. 746.

The courts are to decree the grant sued for valid or invalid, according to the principles prescribed in the statute and the general principles of equity. Act 1860, Sec. 11.

The difference of dates not being of substance or description was immaterial and no variance, for it is well settled that a difference in the date upon which a contract has been alleged to have been made and that upon which it is shown by the proof to have been made, is no variance. The doctrine is thus stated:

"The rule that allegations of time, quantity, value, etc., need not be proved with precision, but that a very large departure from the time, quantity, etc., is allowable, is so well understood and so much a matter of every day practice that no citation of authority to sustain it is necessary. An indictment charging a prisoner with murder on the first day of July would be sustained by proving the murder committed on the 15th of that month. How much more reasonable that a contract alleged to have been made on the first, may be supported by evidence of the same contract made on the 15th of the month."

U. S. vs. LeBaron, 4 Wall. 642.

We know of no exception to this, except in cases where the date is matter of description, but it is not matter of description when the allegation is "merely the usual necessary allegation of the time when the contract was made."

Ibid.

The distinction is shown in a case where suit was brought upon a warrant, in which the court said:

"If the declaration had said that the warrant *bore date* the 7th day of May, this would have been descriptive of the warrant, but not when it is alleged that the arrest and commitment *happened* upon that day."

Henry vs. Tilson, 17 Vt. 479.

This is applicable to deeds, for a date is not of the substance of the deed;

Goddard's Case, 2 Co. 5 a; 2 Blackstone's Com. 304;
Moody vs. Hamilton, 22 Fla. 298;
Jackson vs. Schoonmaker, 2 Johnson, 230-234;

and the date may be rejected,

Swan vs. Hodges, 3 Head (Tenn.) 251-254.

In Blackwell vs. Patton, 7 Cranch, 471, the Court permitted an amendment altering the date of the demise

stated in a declaration in ejectment. And this action is analogous to an action of ejectment.

Scull vs. the U. S., 98 U. S. 410.

The point here is covered exactly by the following:

"Where the allegations and the proofs of a patent agree as to the county wherein the land is situated, the survey number, quantity of land, certificate number, original patentee, the person to whom the patent was granted, and the number and volume of the patent, the fact that the allegation is that the patent was issued February 7, 1857, and the proof is that it was issued February 11, 1857, is not material."

Kennard vs. Withrow, (Ct. Civ. Appeals Texas) 28 S. W. Rep. 226.

In the case at bar, as we have said, the agreement between the grant as alleged and the grant as proved is complete in the matter of grantor, grantee, consideration, description and all of the particulars except the date, which was the situation in the Texas case just cited.

In this case the date of the deed was not matter of description, the allegation being, as to it, that Cienfuegos, Captain General, "on that day (January 10, 1818,) made a formal grant to John Forbes of the lands described (in Spanish,) substantially as translated above, had the same signed, made of record, and deposited among the government records."

This allegation is like the one in U. S. vs. LeBaron, 4 Wall., heretofore cited which the Supreme Court declared not to be matter of description.

The descriptive portions of the allegations in the petition are the statements as to grantor, grantee, the property conveyed and the consideration. It is unnecessary to say that these descriptive averments are found exactly in the original offered in evidence, and, indeed, the answer of the United States admits that the original registro was altered, "the alterations being in the dates of the original." (p. 70 Tr.)

The grant offered being identical with that alleged, except in date, the difference in date was immaterial, for,

The date was non-essential under the act of 1860, under which the petition was brought, since the time of making a grant, to bring it under the act, was of no moment so long as it was before the cession or while Spain was in poses-

sion. An allegation of any date between these periods would have sufficed as well, or it would have been sufficient to say that the grant was made before the cession of Spain, or during the possession of Spain, without stating the date and, therefore, the statement of the exact date was unnecessary, immaterial, and could furnish no basis for a variance.

Board of Commissioners vs. Keene, &c. 108 Fed. 505-515.

An analogous principle, as applied here, is stated to be that whenever the legal effect of two instruments, the one averred and the other proved, is the same, whether the words constituting the alleged variance be inserted or not, such variance is immaterial.

Cannell vs. Milburn, 3 Cranch, (Cir. Ct.) 424;
Fed. Cases, No. 2384;
Nash vs. Towne, 5 Wall. 689-698, (18-529;)
Cited in Moses vs. U. S. 166 U. S. 580.

If our construction of the intention and effect of the act of 1860 be correct, the legal effect in this case of the grant from Spain to Forbes was the same whether it was made on January 10, 1818, or February 20, 1818, for both dates were before the surrender of possession by Spain and a grant made on either date would be entitled to be confirmed under the act.

The use of the Registro upon final hearing, instead of the copy of the exemplification set forth in the petition, could not be reckoned as a variance debarring the petitioners from relief, because the petitioners under the law of Spain governing the evidence of grants could not rely *in limine* upon the registro, the only use of which in evidence was to correct an error or alteration in the original, when such original should be offered in evidence.

Under the law governing the effect of Notarial copies of written instruments executed according to Spanish law, the averment in the petition filed in 1875, that the Captain General made the grant on January 10th was proper, and only after the Government filed the "registro" showing that the dates in the authenticated copies given the grantees followed the alteration made in the "registro" was it proper that they should move an amendment to meet the proof before the Court.

Petitioners were required to make proof of their grant upon the title papers given by Spain.

U. S. vs. Hanson, 16 Pet. 199-200-201 (10-936-937;)
U. S. vs. King, 7 How. text 887-888, (the deed given to the party is the original though taken from the protocol;)
McMicken vs. U. S. 97 U. S. 210 (24-949;)
U. S. vs. Turner, 11 How. 665-668 (13-858-859.)

Under the laws and usages of Spain, the notarial copy is alone evidence in judicial proceedings. The "registro" is only used therein in case the notarial copy is impeached, and then merely to settle the doubts which arise from the impeachment of the authenticated copy.

By the Spanish law written instruments are divided into three classes: "registro," "original," and "traslado." "The registro is the original paper executed, and remains in possession of the Notary to be introduced and used as a protection against fraud, and from which others are copied, and by it we determine any doubts which may arise.

Beyond this use, for which it may be introduced, it is not of use, nor of any effect in a court of jurisdiction, nor does it have any effect as proof.

Translation from page 90, The *Curia Philipica del Juicio* Civil (Edition 1797, Madrid,) title, *Prueba*, Chapter 17, Section 31.

To the same effect is the *Febrero Adicionado*, Part 1, Chapter 14, paragraph 10.

In the case at bar every "copia original" or authenticated copy known to be in existence, those given the grantees as well as those furnished by the Spanish authorities to the King, and by Spain transmitted to this Government, gives the date as January 10th, 1818.

This is prima facie proof that the original is of like date.

U. S. vs. Wiggins, 14 Pet. 346;
U. S. vs. Percheman, 7 Pet 85;
U. S. vs. Delespine, 12 Pet 655;
U. S. vs. Mitchell, 9 Pet. 732;
Gonzalez vs. Ross, 120 U. S. 605 (30-808.)

By the Spanish law (with which the French law agrees) until the public charge of falsity has been made (and established) the Notarial copy is authentic in point of form. The "copia original" imparts absolute verity until the contrary has been established in due form of law. In the case

at bar upon the mere production of the "registro" from the Spanish Archives, the alteration appearing upon its face, (even without any "*salvado*") there is a presumption that it was made by authority, because it has at no time been out of official custody, and because in its altered form it has been authenticated at least three times by Spanish officials. (Tr. pp. 145-156-166.)

Without reference to the presumption of authenticated copies, petitioners in making proof of their title were restricted to the notorial or authenticated copies. They were full proof until such time as the "registro" was produced, proved and filed in evidence to determine the true date, after a conflict in dates was shown to exist.

"An original copy given, signed and authenticated by the Notary who made, perfected and authenticated the protocol, and containing all these requisites, is full proof in judicial proceedings (plena fe en juicia.")

Translations of Febrero Adicionado, Part 1, Chapter 14, Section 11.

"The authentic documents given by the competent authorities constitute full proof (plena prueba,) as also do the copies of the protocol (registro) by the Notary who took them."

Manuel del Abogado Americano, Vol. 2, p. 62, Title 13, de las pruebas;

1 White's Recopilation, p. 297.

The law as here declared has been recognized by this Court,

Owings vs. Hull, 9 Peters, text, p. 625;

United States vs. Sutter, 21 How. 170 (text 16-120.)

As stated by Justice Campbell "for the reason that those, like these, are certified by the same officer whose attestation gives authenticity to the protocol, and who is charged to preserve it;" citing 2 Eschreche's Dictionary of Law, p. 185;

U. S. vs. Davenport's Heirs, 15 Howard, text, p. 7.

Besides the two copies of this grant furnished to the ancestors of petitioners, filed in evidence, the Government of Spain has twice furnished the United States a copy, agreeing in all respects with the authenticated copies furnished the grantees in 1818, and 1824, respectively.

These copies out of the State Department of Spain are

authentic deeds, and have the force of a deposition, because of their official character.

U. S. vs. Hanson, 19 Peters, text, 200-241;
U. S. vs. Wiggins, 14 Peters, 346;
U. S. vs. Boisdore, 11 How. text, p. 97;
U. S. vs. Percheman, 7 Peters, 51;
U. S. vs. Delespine. 15 Peters, 319 and cases cited.

From this "Espediente" or List of Grants made in the Floridas, compiled under the Royal Order of April 29th, 1822, now in the State Department has been filed in evidence a copy of the grant to Forbes & Co. found there on pages 336, *et seq.*; the same is printed on page 156-162 of the record. It will be seen by p. 88 of the record that the part of this "Espediente" which appears in the record on page 153, badly interlined, was proved and translated by the Government's witness, Carreras. In view of the interlineations apparent in the printed record, made by this witness and which do not exist in the original, we ask that the Court will exercise its right, announced in 22 Howard, 392, and 175 U. S., 696, to inspect this document in the State Department at pages 186-239-263-268-306-312-336.

It will be observed that the list was furnished by Spain in A. D. 1835. (Tr. page 162.) A translation of parts of a similar "Espediente," furnished by Spain in *1829*, appears on pages 410 to 454 of the printed record, in the case of Mitchell vs. U. S., 9 Pet., 711, the grant being printed on pages 430, *et seq.*, of that record, showing that Spain has furnished this government with two separate copies of this document.

In all of these authenticated copies Spanish authorities have certified that the date of the grant is January 10th, 1818. Hence in the absence of any explanation of the change of date we say that there is a presumption that the apparent alteration was made by authority. Even at common law an exemplified copy has been received to correct an apparent alteration made in the date of the original.

Page's Case, 5 Coke 74.

The law and usages of Spain being as stated, how could petitioners' counsel have done otherwise than to plead his clients' grant as made on January 10th? Had he pleaded it in the terms set out in the amendment offered at the hearing, it would not have been possible to make the proof required by the nature of the documents delivered by the

Spanish authorities, namely, by a "copia original" authenticated by the Notarial Custodian of the Archives.

"It must be recollected that the deed given the party is the original, though taken from the registro or protocol."

U. S. vs. King, 7 How. text, p. 888 (12-957.)

Even at common law such copies are "a recognition in the most solemn form by the Government itself of the validity of its own grant, under its own seal, and imparts absolute verity as a matter of record."

Patterson vs. Winn, 5 Peters, 241 text.

The "registro" produced by the Government being an exact duplicate of the "copia original" relied on by petitioners, except the difference noted in date, there was no variance in the proof, and consequently no new case made by the amendment ordered. The lands were identical, whether petitioners relied for proof on the authenticated copies as required by Spanish law or upon the "registro," under the rules of the common law. As said, the date was immaterial; any date was sufficient which brought the grant within the power of Spain to make, as recognized by the Act of 1860. Under the law the legal effect of the "registro" and the "copia original" was the same, and the amendment did not make a new cause of action.

Moses vs. U. S. 166 U. S. text p. 578;
Cannell vs. Milburn, 3 Cranch, (Cir. Ct) 424;
: Fed. Cases, No. 2384.

E. If there were a variance the United States could not object to it as such, for it itself introduced the registro which produced the alleged variance.

Washington vs. Hickley, 166 U. S. 521-532.
Nash vs. Towne, 5 Wall. 689-697.

And the Law is well settled that where there is no objection to a variance at the time of the introduction of the evidence, or before argument it is unavailable.

Dunstan vs. Kirkland, 3 Hughes, 641;
: Fed. Cases, 4181;
Roberts vs Graham, 6 Wall. 578.

F. There was a fair trial. The defendant was not misled and there was no surprise.

The petition plainly showed the land sought to be confirmed. It set forth all the proceedings leading up to and following the grant of that land, and not only did the

United States know exactly what was the subject matter of the claims, but *it had in its hands* the registro and knew that the papers relied upon by the petitioners represented the registro as altered, and it cannot be heard to say that the trial was not a fair one as to it, or that it was misled.

A variance does not prevent a recovery when the issues are fairly tried and the defendant is not surprised;

Salt Lake City vs. Smith, 104 Fed. 457.

In this case there was not only no surprise to the defendant, but it actually introduced into the issues and into the evidence the grant which it now contends to be variant.

The grant and the estate to be conveyed by it were the ultimate facts upon which relief was asked; the instrument by which the grant was made and the estate conveyed were evidentiary facts, and,

"Where the ultimate facts, which warrant a judgment for the plaintiff, have been clearly alleged and the issue thus tendered has been fairly tried, a variance between evidentiary facts pleaded and those proved, which has not misled or surprised the defendant, is not fatal to judgment."

Salt Lake City vs. Smith, 104 Fed. 458;
See cases cited 163 U. S. p. 477 (41-233,) also p. 479 (234.)

Of course if there was no variance, it was unnecessary to amend, but the amendment was proper.

An amendment altering the date of a demise in ejectment was allowed.

Blackwell vs. Patton, 7 Cr. 471.

And proceedings for the confirmation of these grants under the act of 1860, are analogous to ejectment.

Scull vs. United States, 98 U. S. 410.

When the defendant is not deprived of any defense upon the merits an amendment is always allowed.

Hallford vs. Blanchford, 2 Sanf. Chancery, p. 152;
Every vs. Merwin, 6 Cow. 366-367.

An amendment to prevent a variance is frequently allowed to prevent the bar of the Statute of Limitations.

McDonald vs. State, 101 Fed. 171-76, *et seq.*

2.

There is nothing in or omitted from the petition which confines the petitioners to a reliance upon the treaty of 1819 and debars them from a reliance upon the act of 1860.

Union Pac. &c. vs. Wyler, 158 U. S. 285, relied upon by the U. S., decides only that when a plaintiff places himself upon one legal position as the basis for his recovery, and thus excludes all other positions, he cannot thereafter rest upon a new ground insisted upon for the first time after the statute of limitations has run. This doctrine is not, however, applicable here for the reasons,

A. That in order that the principle may be invoked there must be an unequivocal reliance upon one ground which excludes the one subsequently relied upon, or an omission of an averment which was necessary in order to authorize a recovery upon the cause of action sought to be incorporated by amendment. There was no such reliance in, or omission from, the original petition.

B. That this is a chancery case in which the complainant is not required to state the positions upon which he relies, but merely the facts, and to ask from these facts the relief desired. In this case the petition fully stated those facts, and the amendment does not seek to change them.

C. That the test as to whether a new cause of action is sought to be introduced, is whether a recovery under the original pleading could be pleaded in bar of a distinct suit upon the amended pleading. In this case there could be no such plea of adjudication in bar.

A. There is no unequivocal reliance upon a cause of action depending solely upon the Eighth Article of the Treaty of 1819 and excluding reliance upon any other ground of recovery, nor is there any omission of facts which would support a recovery under the provisions of the Act of 1860.

The petition states the ownership of John Forbes to a certain described tract of land. It shows the person making the grant and the person to whom it was made. It sets forth all the circumstances attending its making. It gives the date of the grant and asks a certain specific relief.

The circumstances stated make out a case for recovery

under the Act of 1860, as well as under the eighth article of the treaty.

When the facts stated justify reliance upon either of two grounds, if the reliance upon one ground is to be held to exclude the other, such reliance should not only be unequivocal in its assertion, but it should be unaccompanied by any assertion of the other ground, for if there be the assertion of two grounds, it is clear that one cannot be exclusive of the other and equally clear that the subsequent reliance upon either one cannot be the introduction of a new cause of action.

There is in this case not only not an unequivocal reliance upon a right recognized and enforceable under the eighth article of the treaty, but there is a clear assertion of right under the Act of 1860.

Reliance upon a right under the eighth article is not unequivocal. There are statements that the petition to the Captain General was made by Forbes on January 5, 1818, (before January 24, 1818;) that the grant was made on January 10, 1818; that the possession of Forbes was specially protected by the eighth artiele of the treaty; that all grants made before January 24, 1818, remained confirmed by that treaty; that the grant was covered specially by the article of the treaty binding the United States to respect, acknowledge and protect the titles made by the officers of Spain; that the United States pointed out specifically the land titles in Florida, which were objected to and cancelled by Spain.

These are all the expressions of the petition which can be claimed to show that a reliance was placed on the treaty only. They do show that a reliance was placed on it, but they do not show that a reliance was placed on it only. There is no statement to that effect, nor is there any implication of it from the language used. It is merely asserted that the treaty "protected," "covered;" that it bound the United States to respect and acknowledge it; that it specifically pointed out the grants to be cancelled, etc. There was evidently an idea in the pleader's mind that the provisions of the treaty did not destroy this grant, but protected it. He distinctly points out that only the *specifically* excepted grants were cancelled- This may refer to those excepted because conditional and made after January 24, 1818, or to the three grants to Rostro, DeVargas and

Alagon. If it can refer to one or the other, then the reference is not unequivocal.

But, as we have said, there was also a reliance upon the Act of 1860. Necessarily such reliance carried with it all the benefits of the provisions of that Act, including the right to confirmation of the grant, though made after January 24, 1818, and though not protected by the treaty.

The petition is brought under the Act of 1860 and had no standing in the Court, except by virtue of that Act, and it would be absurd to hold that it deliberately intended to throw away the benefit of the Act. Instead of so doing, it relies upon the Act in several places; for instance, it points out the obligations of the Government to confirm the claim and asserts that it was "solely to fulfil such obligations that the Act of Congress *under which we act* was passed." This is a distinct reliance upon the Act. Again, it asserts that under the laws of the United States "*specially provided for cases like the present*" the "heirs are allowed to sue for the lands owned by them." There was no other law in existence except the law of 1860.

Moreover the petitioners rely on the act of 1860 and the rights conferred by it, and acknowledge that the limitation of that act applies to the petitioners' claim for they negative the existence of those things which would have prevented the court from having jurisdiction under the act. The language is:

"Your petitioners further show that at no time whatever has a report of Land Commissioners been adverse to their claim now presented, nor any report suggesting fraud, favoritism or forgery of any part of the evidence above set forth, nor has their claim at any time been presented to or examined by a court of law or equity," which last averment is of course not correct. We are sure however that neither the petitioners nor their counsel were aware of the suit before Judge Brackenridge.

That the petitioners further rely upon the act of 1860 is shown by the allegation, that by the law under which they proceed, they are allowed to sue the United States for the lands owned by them to recover judgment for the lands remaining in kind, *to recover land script for such land as the government has in any manner disposed of or placed beyond its control.*" The provisions italicized above is

found only in the act of 1860 and, therefore, the reference necessarily is to that act.

It would, in view of the facts which we have stated, require a great stretch to hold that the petition unequivocally relied upon the position that only by virtue of the eighth article of the treaty was this claim enforceable. In view of the great liberality of this Court towards the claims to these land titles this court will not so strain itself.

B. Even if, however, there had been an explicit statement of a reliance upon the treaty provisions this would not have prevented a reliance upon the act of 1860 permitting the confirmation of titles excluded by the treaty. This is a case in chancery, and the *facts* are all set forth; these facts justify relief either under the provisions of the treaty or in spite of the treaty, and the court, under the original petition, without amendment, could have granted relief on the latter ground.

This is well settled in chancery practice,

Oteri vs. Scalzo, 145 U. S. 589;

Jones vs. VanDoren, 130 U. S. 684-692;

Hopkins vs. Grimshaw, 165 U. S. 358.

And even though the complainant plants himself upon a wrong ground either in a statement of his conclusions as to legal positions upon which his rights depend, or in his application of that conclusion to the relief which he seeks, the court will grant relief according to the facts alleged and proved, if there be a general prayer for relief. The position is sustained by the authorities; for example:

"If a bill in equity, after alleging facts sufficient to justify a decree, incorrectly assumes additional facts to be the result of the application of the law and the necessary facts alleged, a decree is regular if based upon the necessary allegations and proofs thereof."

Allen vs. Woodruff. 96 Ill. 11.

"Where a bill in equity, filed for relief in one character, alleges facts showing the complainant to be entitled to relief in another, relief would be granted according to the allegations and the proof"

Ridgely vs. Bond, 18 Md. 433.

"Where a bill in a suit by a married woman, for relief from a judgment against her and her husband, stated facts showing plaintiff to be her husband's surety merely, and alleged her to be such, and asked the protection to which

a surety was entitled, it was proper to grant plaintiff the relief due a surety though the bill proceeded mainly on grounds other than suretyship."

Filler vs. Tyler, 91 Va. 458; 22 S. E 235.

"A court of equity, under a prayer for general relief, will extend to plaintiff such redress as will be agreeable to the case made out by the bill whether or not it is specially mentioned in the bill."

Dodge vs. Evans, 43 Miss. 570.

"A court of equity will grant no relief except on matters appearing distinctly in the bill and answer; but a bill containing a prayer for general relief and resting complainant's claim mainly on a ground not sustained by the proof, it appearing that in the bill and answer were a full history of the transaction in controversy between the parties, which disclosed other grounds of equitable relief, it was held that under the bill the court might administer such equities."

Bartee vs. Tompkins, 36 Tenn. 623.

"Under a prayer for general relief the court may grant any that the facts stated will warrant, although inconsistent with the special relief prayed."

Kelly's Heirs vs. McGuire, 15 Ark. 555.

In the case at bar the facts are fully set forth and a specific relief is asked. The facts alleged are not only consistent with, but justify the relief, even though the treaty be eliminated and the act of 1860 be alone considered, and the court under the original petition could have granted such relief.

If it were true that this was a valid grant, made at the time alleged, then it could be enforced against the United States either because coming within the terms of the treaty, or because though not coming within the treaty it came within the terms of the act of 1860.

This being so it is difficult to understand how in a court of equity even the assertion by the pleader of his belief that his rights depended upon one view of the law rather than upon another could be held to prevent the court from giving him relief according to the law and the facts as stated in the bill. If the relief could have been granted upon the original petition, either upon the theory that the petitioners' rights depended upon the treaty, or upon the theory that they depended upon the act of 1860, then an

amended petition relying upon either right would clearly not be the introduction of a new cause of action.

There is nothing in the opinion in Union Pacific, &c. vs. Wyler, 158 U. S. 286, or in the cases cited therein, relied upon by the defendant, contrary to this view. That case was one at law, where the pleader states facts and is bound by the statement; this is in equity, where the pleader states evidential facts and the court works out the relief to which he is entitled upon such facts.

Moreover, in that case the plaintiff relied in the first declaration on the common law liability of the defendant, while in the amended declaration he sought to rely on a right created by the statute of Kansas, a state *foreign* to the State of Missouri where the action was brought. There was no mention of the Kansas statute in the first declaration and the court said that in the absence of such mention there could be no reliance in a trial under the first declaration on a right created by the Kansas statute because the State of Missouri did not take notice of the statutes of Kansas, and therefore, that that statute had to be pleaded. The decision was unquestionably right and sustains us. A foreign statute is a fact to be pleaded like any other fact. If that fact be an essential of the cause of action, and in one declaration be omitted and in a subsequent one be inserted, it is clear that there is a new cause of action.

In the case at bar, however, there was no foreign statute, but an act of congress relied upon in a federal court, and it was of course not necessary for such act to have been pleaded.

Jenkins vs. Collard, 145 U. S. 560-561;
Jones vs. U. S. 137 U. S. 202, 212, 215;
U. S. vs. Reynes, 9 How. 147-148.

In the case of reliance upon a domestic public statute "it is only necessary to state facts which will appear to the Court to be affected by the statute," since they "must be noticed by the Court without their being stated in pleading."

1 Chitty on Pleading, (16 Am. Edition) p. 237.

The Supreme Court of Michigan says, "the facts alleged in the declaration were sufficient to establish a liability under the statute, without which there would be no remedy, but we see no reason for requiring the pleader to expressly refer to the statute. He must make a case, bringing the

defendant within the liability created by the statute. When this is done the defendant cannot be misled, nor can any doubt exist but that the declaration is framed under the statute."

Clarke vs. Village, etc. 88 Mich. 308;
50 N. W. 254.

Also in the case where a railroad company was declaring concerning a right-of-way which was given to it by a public statute, the Court held that "an affirmation by a railroad company that it had 'the legal right to take, hold, use and occupy a right-of-way over the land in controversy' being based upon public statute is sufficient without citing or setting out the statute in such pleadings."

Chicago, etc. vs. Porter, 72 Iowa, 426;
34 N. W. 286.

And the same rule applies when the statute is set up as a defense. The Court says: "In setting up a defense under a public statute it is not necessary either in this Court or in a Court of law that the pleader should set forth the statute in his plea, or that he should allege the existence of the statute of which the Court is bound to take notice judicially. It is sufficient for him to state the facts which are necessary to prove a case within the operation of the statute and to insist that upon those facts the plaintiff's right or remedy is at an end or never existed. The Court will then judicially notice the existence of the statute and declare its legal effect upon the case as made by the pleadings."

Bogardus vs. Trinity Church, 4 Paige Chan. 197.

Beyond this there was in the original petition a direct reliance upon the act of 1860, the petitioners expressly referring to that act as "the act of congress under which *we act*," and a reference is made to provisions, contained in that act only, allowing a recovery of script when the land sued for had been conveyed. Even though this reference was not in form, yet the petitioners having shown the existence of the act would be allowed to amend, so as to set out a reliance upon the statute more fully.

R. R. Co. vs. Nix, 68 Ga., 572.

The leading case cited and pleaded in the Wyler case (Bolton vs. Ga. Pac. R. R. Co. 83 Ga 659) was a like case where the first reliance was upon the common law right and the second upon a right created by a foreign statute.

The Court emphasizes our contention by showing that the statute was an essential *fact*, and although all other facts were stated the omission of this fact would have prevented a recovery under the statutory right set out in original declaration.

So there is nothing in the case of Sicard vs. Daves, 6 Pet. 124, that militates against the propriety of the amendment. In that case a declaration in ejectment was amended to assert a demise from a different party asserting a different title from that originally sued on, the defendants having given in evidence a junior patent and proof of settlement thereunder and holding adversely to the title brought on by amendment. This case is distinguished in Texas Ry. Co. vs. Cox, 145 U. S. 604, upon grounds similar to the facts which take the case at bar out of its effect.

In the case at bar the grant is the same, whether proved by the notarial copies setting it out as made January 10th, or by the "registro" dated February 20th, and altered to read as of January 10th. All the preliminary proceedings leading up to the grant are identical in each and the dates identical up to the order of reference for proofs. Under the act of 1860 the court is required to adjudge what the equities of the claimants are, and to do this it is proper to look at all the several parts and ceremonies necessary to complete or to prove the title, and to take them together as one act.

Yontz vs. U. S. 23 How. 495 (16-473)
Landes vs. Brant, 10 How. 372.

The legal effect of the amendment was an acceptance by petitioners of the proof of the title made by defendants. After the "registro" was put in evidence, under the law applicable to the proofs, it controlled as to the true date, and the identical grants sued for in the original petition stood proved as made, to the identical grantees as in the petition alleged but upon a day 41 days later than alleged.

C. One of the tests as to whether an amendment or offered proof introduces a new cause of action is whether, if the petitioners failed to recover upon the cause of action stated in the original petition they could afterwards sue upon the cause of action stated in the amended petition, *i. e.*, whether the decree upon the original petition against petitioners

could be pleaded as *res adjudicata* to the cause of action stated in the amended petition.

North Chicago, &c. vs. Monka, 107 Ill. 343,

If the cause of action were the same then there would be an estoppel, but if they were n t the same there would not be such estoppel.

It seems too clear for argument that there would be no defense to a plea of *res adjudicata* in the case at bar. Applying this test, the same parties, the same grant, the same statutory right, and the same opportunity to litigate every phase of the right would prevent the petitioners from successfully resisting a plea that a judgment upon the original petition was a bar to the suit upon the amended petition.

Sixth Assignment of Error.

This assignment of error (p. 133 Transcript) is as follows:

"VI. The Court erred in ordering, adjudging and decreeing that the grant by Cienfuegos, Captain General of Cuba, to John Forbes & Company, made on the 20th day of February, A. D. 1818, which was so altered as to appear to have been made on the 10th day of January, A. D. 1818, for the lands described, was a valid, just and binding title against the United States,"

We gather from the answers filed and from the oral argument in the District Court, the contentions of counsel to be that the decree was erroneous for the reasons following:

a. Because, as contended, the grant was annulled by the Treaty of 1819 with Spain.

b. Because, as contended, this cause is not authorized to be brought under the act of 1860.

c. Because, as contended, the grant was made without authority of Law.

d. Because, as contended, it had been rejected by the Superior Court of West Florida in A. D. 1830.

e. Because of the alteration in the date of the grant.

f. Because, as contended, the lands granted were the property of the Indians.

C. The grounds (a) and (b) will be considered under the 8th and 9th assignments of errors.

The Captain General had authority to make the grant in question.

The United States is concluded upon this point by the law and the decisions of this court. The power to grant lands in West Florida was expressly conferred on the Intendent of Cuba.

U. S. vs. Clarke, 8 Peters 452 (8-10001.)

He had power to adjudge on the equity of the claim and exercised sovereign authority as the King's deputy.

Chouteau vs. Eckhart, 2 How. p. 374, text;

United States vs. the Mayor, etc., 11 How. p. 660 text, citing the Recopilation.

The Captain General exercised not only the Supreme executive authority, but also supreme legislative and judicial power. The grant recites that it is given as an indemity and in full compensation for the cancellation of a claim duly proved, and found by the Captain General to amount to one hundred thousand dollars. By the express language of the grant it is a judicial act and adjudges to Forbes and Company an absolute title to the lands described. The term used to transfer title is not the usual word employed "concede" "I grant" or "se le concede," "let there be granted," but is a legal phrase, "applicaba y aplico," meaning that as the results of a judicial proceeding the lands are adjudged the property of the grantee. The phrase used is a law term, equivalant to our words "adjudged and decreed" used in a decree in equity. The words referred to everything prayed in the petition, and severed the land at once from the royal domain and converted it into private property.

U. S. vs. Turner, 11 How. 665;

Smith vs. United States, 10 Peters, 332.

Without the solemn judicial form of decree, if the Captain General granted the land by a complete title, it is conclusive in a suit wherein the United States by consenting to be sued has authorized the court to decide as between man and man.

Arredondo vs. U. S. 6 Peters, 711;

Keen vs. McDonough, 8 Peters, 310, (8-955.)

Mr. Justice Catron speaking of a grant without conditions says "its genuineness and proof of identity of the land would settle the question of title."

Glenn vs U. S. 13 How. 261.

The same Justice says, upon a like objection that a grant was made without authority; "it is sufficient to say that the

Governor as the King's deputy was the sole judge of the merits on which the claim is founded, and had undoubted power to reward the merits of the grantee; so this court has held in many cases."

U. S. vs. Acosta, 1 How. p. 26 text;
U. S. vs. Segui, 10 Peters, 306;
U. S. vs. Hanson, 16 Peters, 199.

(d.) The decree of Judge H. M. Breckenridge in 1830 in the Superior Court of the United States for West Florida rejecting the claim then made for a confirmation of the title evidenced by this grant is not a bar to its confirmation under the act of 1860 by the decree rendered herein on the 8th day of April, A. D. 1905, by the court below.

The contention of appellant to the contrary as set up in its answer is, that under the Act of May 23, 1828, the same parties upon the same title papers, presented "the very same claim" to the Superior Court of the Western District of Florida, and that in conformity to the rules, regulations, conditions and limitations of the Act of May 26th, 1824, the claim was rejected; that no appeal was taken and that by Statute this decree became final and is conclusive as a bar to the present proceeding. (Page 69 Tr.)

That appellant's contention is not maintainable results from the considerations,

1. That Judge Breckenridge, having determined that the grant was made after January 24th, 1818, had no jurisdiction to decide anything further.

2. That he did not decide anything beyond this.

3. That the decision that the grant was not enforceable against the United States consenting to be sued under the conditions and limitations imposed by the Act of May 26th, 1824, because made after the date fixed by the Treaty as the limit to which grants were to be recognized as valid by the United States is no bar to a decision now that Congress by the Act of 1860 has advanced the time within which the United States will recognize grants made by Spain in West

Florida from January 24, 1818, to July 21st, 1821; in other words, to a decision that the Act of 1860 has created a new right, which will be enforced. This is the doctrine both,

a. Of the general law of estoppel, and

b. Of the decisions of this court upon this Act, upon the very contention relied upon by appellants.

1. By the 6th Section of the Act of May 23, 1828, (4 Stat. at Large, p. 284) under which the Superior Court of West Florida acquired jurisdiction of the case, the rules of decision were prescribed, and all claims were required to be received and adjudicated according to the forms, rules, regulations, conditions, restrictions and limitations prescribed to the District Judge and claimants by the Act of May 26, 1824. (4 Stat. at Large, p. 52.) By Section two of this Act the court was required to determine the question of the validity of the title according to "the stipulations of any treaty and proceedings under the same."

U. S. vs. Clarke, 8 Peters, p. 467, text;
Smith vs. U. S. 10 Peters, p. 321, text;
United States vs. Wiggins, 14 Peters, text, p. 350.

"Of course in proceedings under any particular Statute the limitations prescribed by that Statute must control."

Ely vs. U. S. 171 U. S. p. 224, text;
U. S. vs. Arredondo, 6 Peters, p. 711, text.

The court can neither change nor modify the Act of Congress, and if it attempts so to do, its orders are void.

U. S. vs. Curry, 6 How. p. 112, p. 113, text.

By the Act of May 23, 1828, (4 Stat. at Large, p, 284,) the Act under which Judge Breckenridge acquired jurisdiction over the case,—that being the only section giving jurisdiction—it was declared "that nothing in this section shall be considered to authorize said Judges (District Judges) to take cognizance of any claim annulled by the said treaty or the decree ratifying the same by the King of Spain."

The Superior Court had jurisdiction to decide in the first place whether, according to the principles which the political departments of the Government had established, this was a grant which the United States had stipulated to recognize. The moment the court found that the grant fell within the class which Congress and the President had expressly refused to recognize, that moment, its juris-

diction, under the Act of 1828, to inquire into and decide upon the validity of the claim, ceased. The United States would not have been bound by its judgment had it been adverse to them, and hence cannot claim the benefit of a favorable judgment.

Moore vs. City of Albany, 98 N. Y. text, p. 408-410.

It is unnecessary to indulge in reasoning on the point, for it has been adjudicated by this Court.

Under the Act of March 3, 1891, (23 Stat. at Large, 854,) giving the Court of Private Claims authority to investigate certain classes of grants, it was provided:

"No claim shall be allowed for any land the right to which has hitherto been lawfully acted upon and decided by Congress."

Under this Act the Court of Private Claims took jurisdiction of the claim and decided that for the reason that Congress had already acted, it could not confirm it, but formally expressed its opinion that the title was in the claimants. The United States appealed and this Court reversing the judgment, said;

"The whole jurisdiction conferred upon that Court is to confirm or reject the claims presented to it, coming within the Act. All the powers conferred upon it are incident to the exercise of that jurisdiction. When it has no jurisdiction to confirm or reject it has no authority to inquire into or pass upon the case beyond the question of jurisdiction. The primary declaration of Congress that "no claim shall be allowed for any land the right to which has hitherto been lawfully acted upon and decided by Congress" necessarily prohibits the Court from passing upon the merits of any such claims. * * * * It necessarily follows that it has no right to express any opinion upon the merits of it when the right to all the land claimed has already been decided by Congress. * * * * The Court of Private Land Claims having discovered that by an express prohibition of Congress it was without jurisdiction to confirm the land to the petitioner, the merits of the case cannot be decided by that Court, and the Court below, which undertook to pass upon the merits, must, therefore, be reversed."

U. S. vs. Baca, 184 U. S. 653.

In the case at bar the Judge found that he had no jurisdiction to confirm the claim because the grant was made

after the date named in the treaty as the limit within which the Political Department of the Government bound itself to recognize grants made by Spain. The decree was not appealed from and remained unreversed and forever bars any inquiry into the correctness of that finding. It does not bar, however, the inquiry into any other matters which it was beyond the jurisdiction of the court to decide.

2. The Judge did not attempt to decide any other matters. His opinion is replete with conviction that he knew and felt the limitation of his power and studiously kept himself within it.

At the outset of his opinion he declines to discuss anything but the question:

"Whether this be a genuine grant, within the time fixed by the treaty, because if it be not, it is useless to take into view the authority of the granting power or the regularity of the grant."

He had before him two papers, a paper purporting to be the original grant or REGISTRO, and a paper purporting to be a correct exemplification of the original grant. The former was evidently made on Feb. 20, 1818, a date after the date fixed by the treaty, and the latter purported to be a true copy of a grant made on January 10, 1818, a date before the date fixed in the treaty. To determine which was the true date of the grant, he was compelled to find which of these papers controlled the other. He found that the Registro was a true and genuine grant; that the date fixed in it was February 20, 1818, and that, therefore, he had no authority to confirm the grant, and he rejected it. He did nothing more nor less than this

In the conclusion of the opinion he epitomizes his finding and decree as follows:

"Being fully satisfied that the claimants have no lawful grant prior to the 24th of January, 1818, I feel myself bound to reject their petition. I also consider it unnecessary to consider the other points raised by the counsel."

He does consider the alterations of the REGISTRO, but only for the purpose of determining the question as to whether they were made in such a form as to make them valid, and thus to cause the instrument to speak as of the date of January 10, 1818, but having concluded that they were not saved by a *Salvado*, and were therefore ineffectual,

he declares that the grant speaks as of the original date, February 20, 1818, and was, therefore, by the express stipulations of the treaty, one which the political departments of the government refused to recognize.

The final decree is in terms a rejection, "for the reason stated in the opinion," that is, because the grant was after January 24, 1818.

Judge Breckenridge's finding and decree is as if it read, "I feel myself bound to decline to pass upon the merits of this claim from lack of jurisdiction, because I find that the grant was made after the date named in the treaty as the date within which the United States will recognize grants made by Spain in the Florida's, and the Act by which I am authorized to take cognizance of the claim requires me to decide according to the stipulations of the treaty of 1819."

3. This being his decision, obviously it is no bar to the assertion of the right now sought to be asserted. The petitioners admit that the decree adjudicated forever the question that the REGISTRO was dated February 20, 1818, and was therefore not at that time an enforceable grant, but they assert that by virtue of the validating power of the Act of 1860, a right of enforcement has been created which was not in existence in 1830, and therefore, could not have been adjudicated in that suit; that such new right would not be barred by an adjudication as to the right previously vested. This the doctrine of

A. The general law of estoppel.

A decree between the same parties about the same property is not an estoppel except as to the right therein, or which might have been therein, litigated. If a new right to the thing litigated should be afterwards acquired by one party, of course he could assert that right against the other without prevention by the estoppel of the judgment. Where the same issue was not pleaded nor tried, that fact prevents the operation of estoppel. The right, question or fact, must have been distinctly put in issue and directly determined by a court having jurisdiction.

So. Pac. Ry. vs. United States, 168 U. S. 49;
DeChambrun vs. Schermerhorn, 59 Fed. 508.

An adjudication is conclusive only as to those matters capable of being controverted between the parties at the time, and as to the conditions then existing, and cannot

operate as an estoppel to another action, which though involving the same rights passed upon, yet is predicated upon facts which have arisen subsequent to the former adjudication.

24 Enc. Law (2nd Ed.) 777.

A judgment in a former suit between the same parties is a bar to a subsequent action, only when the point in question is the same in both. The judgment has no effect upon questions not involved in the issue and which were neither open to inquiry nor were the subject of litigation.

Norton vs. Huxley, 13 Gray, 290;
Merriam vs. Whittemore, 5 Gray, 317.

The judgment in the prior action acts as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. Only upon such matters is the judgment conclusive in another action

Field J., in Cromwell vs. Sac. County, 94 U. S. 351.

As in point see the case where this court had held invalid certain bonds (155 U. S. 54,) but they were afterwards validated by Act of Congress. The court says, "The fact that this court had held the original Pima County bonds invalid does not affect the question. (Page 19.) * * * The judgment in that case was *res adjudicata* only of the issues then presented, of the facts as they then appeared, and of the legislation then existing."

Utter vs. Franklin, 172 U. S., p. 424.

They were invalid because there was no power to issue them. They were made valid by such power being subsequently given, and it makes no possible difference that they had been declared to be void under the power originally given.

In the case at bar the right upon which we now stand did not then exist and could not have been litigated. This matter is, however, foreclosed by

B. Decisions of this court upon this Statute directly in point.

In one case the claim had been rejected by the District Court and that rejection affirmed by the Supreme Court. After the passage of the Act of 1860, suit was again brought upon the claim. It was entertained by the courts and con-

firmed, this Court commenting upon the fact that it had, before the Act of 1860, been rejected by the Court.

U. S. vs. Lynde, 11 Wall. 632.

This was directly decided as shown by the dissent of Justice Clifford, he holding that the "Act of Congress in question did not confirm any grant previously adjudged void by the Federal Courts in pursuance of the prior Act of Congress conferring jurisdiction to hear and determine the controversy."

The case of D'Auterive was decided against claimant in 10 How. 609, because made after the treaty of San Ildefonso and under the Statutes thereafter made the grant was not recognized as one which Spain had the right to make at the time when it was made, and again decided against him in 15 How. 14. Still, however, when the same case came before the court after the passage of the Act of 1860 it took cognizance of it, and without recognizing any bar from the former adjudication proceeded to investigate the enforceability of the grant under the Act of 1860.

Dauterive vs. United States, 101 U. S. 700.

These decisions are under the Act of 1860 and are conclusive. Although the lands did not lie to the east of the Perdido, necessarily the principles of the estoppel would be the same as to any of the classes of land covered by the Act.

SPECIALLY AS TO FLORIDA LANDS, however, this court has declared that the purpose of the act was to relieve claimants, even though the courts had already rejected the claim, because required to do so by the terms of the treaty. The court is dealing with Florida Grants, and the contention that they were annulled by the 8th article of the Treaty and is applying the Act of 1860 to them and its language is, "The Act of 1860 was intended to give relief to a large class of grantees of former Governments whose claims had been rejected by different Boards of Commissioners and by the Courts, under the strict construction of the treaties, which prior laws had required."

U. S. vs. Morant, 123 U. S. p. 342.

The meaning of this as applied to the case then in question and as to this case is, that the treaty of 1819 and the Laws under it had caused the rejection by Board of Commissioners, and by Courts of grants because made

after January 24th, 1818, but the Act of 1860 was intended to give relief to those classes of claimants against whom decisions had been rendered. This is conclusive of this branch of the case.

(e.) The title evidenced by the registro produced by the United States, proved and admitted to be the original petition presented by Forbes, with the proof had thereupon, and the finding and decree thereon by the Captain General of Cuba was not affected by the alteration of dates therein.

That the registro was signed by Cienfuegos on February 20, 1818, and afterwards altered to bear date January 10, 1818, and the notarial copy of the order of possession given by Masot altered from the original date of March 23, 1818, to January 23, 1818, is too clear for dispute.

In the discussion of this question it is well that the Court should have an exact understanding of what was in evidence in the Court below as the grant and its alterations, and to that end the members of the Court are asked to inspect the original "Expediente" sent up by order of the District Judge, because the printer has failed to reproduce the originals on pages 134 to 142 of the record. An examination of the Spanish originals will establish that each sheet, both of the "registro" and the attached copy, including the original petition of Mitchell for such copy and its accompanied endorsements, is upon official paper for the years 1818-1819; that the stamp, including the King's seal is at the top of pages 1, 4, 5, 8, 9, 11, 13, 16, 17, 20, 21 and 24 of the "registro," as necessitated by the use of sheets and half sheets of official paper; that each proceeding follows in regular sequence from page 1 to page 23, where the "registro" ends; that to the "registro" there has been attached, beginning at page 25, the proceedings taken and made for the preservation of an authentic copy of the order of possession given the grantees by Governor Masot in March, 1818, which date has been altered to January.

In some manner, doubtless because the printer did not understand its importance, the record has been so printed as to fail to show the paging or arrangement of the original

papers, has misplaced the official seals and wholly omits to indicate the blank pages, 23 and 24, which follow the "registro;" and the facts that the endorsement of the Captain General upon Mitchell's petition is made upon the margin, and that this copy is verified by the official seal of the College of Notaries. This manner of presenting the Spanish copy of the title papers changes their whole character, so that it is necessary to ask the Court to rely upon the originals sent up from the District Court, and not upon the confused copy as it appears in the printed record.

The attention of the court is directed to what is the Registro in the case. There can be no question that the "Registro" ends with page 23 of the original papers sent up by order of Judge Locke, the last words being "en dho, dia lo hize saber A D, Juan Forbes doy fe Mendez," printed on page 141 of the record. The remainder of page 23 and all of page 24 is blank, while in all other parts of the "Registro" each instrument or proceeding, even when made by another officer, has been written on the same sheet, without any blank pages. It needs no argument to establish that the petition of Colin Mitchell for a copy of the order of possession and that copy which are attached to the Registro as a part of the "expediente," are no part of the registro or judicial record divesting title out of the King and vesting title in the firm of Forbes & Company.

The papers other than the registro consist of a petition presented in December to be furnished copies of an original order dated the March previous, which original the petitioner had in his possession and which was returned to him. Although this petition and the proceedings had thereon, (pages 25, 26, 27, 28 and 29 of the document sent this Court by the District Judge,) have been by some person unknown attached to the *registro*, from their very nature, as copies, they can be no part of it. The *registro*, pages 1 to 23, inclusive, of the original document sent to the Court, constitute a *titulo en forma*, gives the property to the grantees, and is the complete and perfect evidence of their title from its date.

United States vs. King, 7 How., text, 890.

It is probable that the petition of Mitchell and the authenticated copy of Masot's order were attached to the "registro" when the documents were delivered to Commis-

sioner R. K. Call. The date 1829 on the cover of the document confirms this supposition.

It may be true as held by Mr. Call, the special commissioner to receive the archives and of counsel for the government in the former suit upon this claim, that the alterations in the registro were made for the purpose of exempting this grant from the provisions of the 8th article of the treaty, and this alteration was unauthorized and fraudulent. This, however, does not affect the title conveyed by the decree of Cienfuegos, nor make the registro inadmissible as evidence of title, because,

1. By the Civil Law the alteration itself was of no effect, and the validity or enforceability of the instrument was not affected.

2. If the test be by the common law, still the rights of the petitioners to rely on the title evidenced by the Registro is not affected by the alterations, because,

a. It is not shown, nor is there any presumption that they were made by the Grantees or by their procurement.

b. Even if made by them they were made after the title had been vested, and therefore cannot affect such title, nor prevent the use of the instrument as evidence thereof.

1. It is difficult for us at this lapse of time to be always certain of what the Spanish Law was and we are compelled therefore to be very careful of how we reject Spanish titles for Acts done while Spain had possession and when their validity depends upon Spanish Law.

U. S. vs Perchman, 7 Peters, 51.

In this instance, however, we find the Spanish Law on the subject stated as follows:

"The document will not then be null and void because of the alterations not noted as correct, or words which are found in it, because it cannot, nor should be arbitrary with the Notary, nor any other person to destroy thus the effect of an authenticated document to the prejudice of those interested. The alterations will be on the contrary, the ones which will be null and void. The additions, obliterations, erasures and corrections will themselves be as non-existing, and the words illegally obliterated or erased or corrected will be considered as existing, and their (the additions, etc.,) operation will always be entirely destroyed if it can be discovered from the tenor or by the interpreta-

tion or combination with what precedes or follows, the original meaning can be determined.

Escriche's Dictionary of Jurisprudence, pp. 888-889.

If the above be the law, then no effect whatever is to be attributed to the alterations and the Registro is intact and the title conveyed by it is also *intact*, as if no alteration had been made.

2. If, however, we were ignorant of the civil law covering the point and assume that it was governed by the common law, the same result is reached.

A. The presumption in favor of innocence applies in the case of alterations of instruments and prevail unless there be countervailing facts or presumptions.

Speake vs. U. S., 9 Cranch, 37.

There can be no doubt that as directed in the grant the Registro was deposited and kept in the King's Archives until delivered to the agent of the United States. That such was the law of Spain the Court will judicially notice.

6 Peters, 722: 9 Howard 167, 663;

17 Howard, 442-557 (15-245,) 98 U. S, 428, (25-252) (31-457.)

The alterations appearing therein must therefore have been made by an authorized Spanish official as an official act or by a stranger, and in the latter case they are a mere spoliation or mutilation of the document.

In law, therefore, such alteration, if the same was in fact unauthorized by the Spanish officials, affected no change in the legal operation of the document, the original writing remaining legible as was decided by Judge Brackenridge and as this court will see on inspection.

1 Green Ev. Sec. 566, cases cited note 1;

Henfee vs. Bromley, 6 East, 309, 2 Smith 400.

The doctrine that a material alteration made by a stranger avoids the instrument has never been introduced into the jurisprudence of this Country. Even in England if the spoliation takes place when the instrument is out of the custody of the party claiming under it, his rights are not impaired thereby. Note to Masters vs. Miller, 2 Smith, 9th Am. Ed.

Judge Story in United States vs. Spaulding, 2 Mason, 478, says, as to the doctrine that a material alteration avoids the instrument though made by a stranger, that it is repugant to common sense and justice; and Lord Denman,

Chief Justice, in Davidson vs. Cooper, 13 M. & W. 343, says "the strictness of the rule as laid down in Pigot's case can only be explained on a principle that a party who has the custody of an instrument made for his benefit, is bound to preserve it in its original state."

The same rule has always applied to a record, as to which the law is declared to be, that a record rased, if legible, remains a good record notwithstanding the rasure.

Jacob's Law Dictionary, Vol. 5, p. 398, (edition 1811.)

The same rule is applied to wills, which being in the custody of the testator, partake more of the "Registro" under the Spanish Law than ordinary title deeds under the English system. The court has always granted probate of wills in their original form where the will contains an unexplained alteration, interlineation or erasure.

2 Enc. Law, p 265, (2 Edition;)
1 Taylor on Evidence, Section 164.

Section 1582 of the Civil Code of Louisiana evidencing the civil law to the same effect.

Unauthorized alterations in a will have no effect if the original words can be shown.

Malin vs. Malin, 1 Wend., 625, text, page 659.
See cases cited, 2 Enc. Law, p. 268, especially Doane vs. Hadlock, 42 Me. 72.

Unquestionably a presumption arises from their interest that the grantees procured or were concerned in the alteration of the dates in the Registro, and copy of Masot's order attached thereto. This presumption is, however, met by one fact and conclusively overcome by another—the fact of the ignorance of the petitioners in the suit before Judge Brackenridge of the existence of the alterations, and the fact that the grantees and their heirs had never had possession of, or access to, the "registro" and copy of Masot's order as altered.

Counsel for petitioners before Judge Brackenridge secured a subpœna *duces tecum* to procure the production of the original of the grant and gave notice of their reliance upon the same to establish their title, (pages 164 and 190 Tr.) Upon the production of the original the petitioners were taken by surprise at the alterations apparent, and repudiated it. (Opinion of Brackenridge, Judge, page 80 Tr.)

(Exhibit No. 4, page 466 of record transmitted, omitted in printing.)

Forbes was dead at the date of the former suit but it can scarcely be conceived that his partners would have been ignorant of the fact if Forbes had known that the dates in the registro and copy attached had been altered. Their conduct is conclusive that they were ignorant of such alterations. The registro being genuine in all respects save the alterations of dates, and continuously in the custody of the officer of the King, the burden is clearly upon the appellant to establish that the alterations were unauthorized.

United States vs. Linn, 1 How. 104-113, text.

The dignity and character of a registro is such that the grantees therein cannot be called upon to explain even apparent irregularities or improprieties therein.

United States vs. Marshall Silver Mining Co. 129 U. S., p. 579-589, (32-738.)

United States vs. Stinson, 197 U. S., text, p, 204.

Documents furnished by the proper Spanish officer ought to be regarded as genuine, unless impeached by other testimony.

Chief Justice Taney, U. S. vs King, 3 How. text, 786.

We think the burden of accounting for the alterations in the report of the Committee cannot justly be thrown upon the claimants. They produce the certificate of the approval authenticated. The genuineness of this document is not disputed, or if disputed is conclusively proved. That the report of the committee with the resolution of approval attached, which is preserved in the archives, should contain interlineations, is a circumstance which might very well happen, and yet the claimants have no means to explain it. If the certificate of approval given to the party interested be genuine, it must be received as legal and conclusive evidence of the fact, unless other circumstances show that it was improperly furnished through fraud or mistake.

United States vs. Bernal, 1 Hoffman's Repts., text, p. 62.

A patent for land may only be impeached by actual and positive fraud in fact committed by the person who obtained it.

Stringer vs. Young, 3 Peters, text, p. 341.

But conclusive against the alteration of the dates in the registro and in the notarial copy attached thereto by procurement of the grantee, is the fact that the expediente embracing both documents was a part of the archives of the Spanish Government and remained as such until it passed into the hands of the United States from R. K. Call, upon procurement from the archives of Cuba. (Page 191 Tr.)

Mitchell vs. United States, 9 Peters, text, p. 732.
United States vs. Wiggins, 14 Peters, 345-346, text.

The want of possession of either the registro or the notarial copy of Masot's order attached thereto by the persons interested in the alteration, rebuts the presumption arising from the fact that such interest prompted the alterations.

Opinion Judge Brackenridge.

See also United States vs. Galbraith, 2 Black, 394, where the court comments upon the case of United States vs. West, 27 How. 315, and lays the strongest stress upon the absence in the West case of the instrument from the possession of the claimant, while in the Galbraith case "the certificate of approval and the title in form both came from the hands of the claimants." (17-450.)

It is universally held that the alteration of an instrument in official custody will not prejudice the right of a claimant under the instrument.

Friedman vs. Shamblin, 117 Ala. 454;
United States vs. Hatch, 1 Paine, 336;
DeVoy vs. the Mayor, 35 Barb., 264;
People vs. Minck, 21 N. Y. 539;
Casoni vs. Jerome, 58 N. Y. text, 321;
See U. S. vs. Linn, 1 How. 111–113–115.

The presumption is very strong that the alterations were made by the Spanish officials in charge of the archives and the REGISTRO.

The proceedings were begun on the 5th of January, 1818, before the date finally fixed in the treaty as the time limit for the recognition of grants made, and were completed only twenty-seven days after such limit. Forbes and his house were evidently high in favor with the Spanish officials.

U. S. vs. Mitchell, 9 Peters, 726-727.

And such officials could have been actuated by a threefold motive in making the alteration; a desire to do what

they considered to be justice in making effective a grant which was so near completion at the arbitrary date fixed by the treaty; a desire to benefit Forbes and Company and a general desire to relinquish as little property to the United States as possible. The proposal by Spain for the cession did not take place until October 24th, 1818.

See Executive Papers, Vol. 1, Sess. 16 Congress, Doc. 2, p. 25;

See Letter Sec. State, Doc. 274, 1 Sess. 22 Congress, p. 12.

Mr. Livingston writes: "The first formal and written proposition (for the cession of the Floridas) came from Spain through their minister in a note inclosed in his letter of the 24th of October of that year" (1818.)

The fixing of the day beyond which grants would not be valid was not done until later and long after this grant was complete, and we can well imagine the chagrin of the Spanish officials when, in the slow course of transmission of news of that day, they first learned that an arbitrary date had been fixed and that the date excluded from recognition by the United States this very large and important grant, made as an indemnity for claims against the government, begun and completed in good faith, and without any suspicion that there would be any subsequent declaration of invalidity, and it was but a step to the alteration of the grant by changes which they thought justice demanded and which would never be known.

It must not be forgotten that Cienfuegos made the grant in settlement of pecuniary obligations of Spain to Forbes & Company. It was a payment in the only manner Spain could pay for a claim against the Royal Treasury, adjudged to be valid, and the grant recites its receipt in full compensation, and thereby "the demands of said firm for indemnity cancelled."

The view that these alterations were made by Spanish officials and were presumed to be regular, is much strengthened by the fact that high Spanish officials, knowing of the alteration, several times reported the grant as a valid grant and failed to believe that the alterations were made by persons under such circumstances as to destroy the grant. Thus, on the 19th day of December, 1818, the Notary, before whom the grant was made, furnished a copy of the document, as of the date of January 10th, 1818, with

no mention of the alteration or amendment of the date of the grant. In his report of the 20th of August, 1824, Vincence Pintado, Surveyor General, reports under date of Oct. 31st, 1823, that on Sept, 15, 1819, he made a plat of these lands by order of the Captain General, of date July 19th, 1819, and he asked for data which were communicated to him through these documents In this report he fixes the date of the grant as Jan. 10th, 1818. By this report made upon the order of the King, of April 29th, 1822, to furnish a list of all the grants made in the Floridas, he stated that he was shown the original or primitive record, that is to say, the REGISTRO, now before this court, and made an authenticated copy of it. (Page 152 Tr.) He reports the grant to have been made January 10th, 1818. A copy of the grant showing it to have been made Jan. 10th, 1818, was furnished by the Govermment of Spain to the United States in 1829, (filed in evidence in Mitchell vs. U. S., 7 Pet., 717,) and another, showing the same date, in 1835. A copy of the grant certified by the Government Notary was presented to the Land Commissioners in 1824 (4 Am. St. Pap. 169, *et. seq.*) A copy is also in 2 White's Recopilacion, p. 350, *et. seq.* (156 to 163 and 86 and 181 Tr.) We have thus four recognitions by high Spanish authority, that while the grant was altered it was done by officials and others presumed to have authority and thus to give official character to it. This furnishes the strongest evidence that no private individuals were supposed by these officials to have made the alterations. If done by or with consent of the Spanish officials, claimants are not prejudiced. The Court is not authorized to pronounce a forfeiture for anything done or omitted by Spanish officials.

Hornsby vs. United States, 10 Wall, 224 (19-904.)

The salvado attached to the authenticated copy of Masot's order, (page 29 of the original documents sent to this Court by the District Judge.) shows that the alteration of date from February to January of the grant was validated or attempted to be validated by some Spanish officials having the custody of the papers, as no others had access to them. There appears there this entry; "Entre rengs—a diez Em do Enero–vale." Properly translated this reads "the foregoing interlineation noted—the alteration to the 10th of January—is valid." The Spanish words on p. 101 and

their translation on page 190 of the Record are so badly printed as to make them unintelligible.

It is claimed that this entry is there without authority. Because the "Salvado" is in a different handwriting and in different colored ink does not establish that it was unauthorized. It would not have been likely to have been placed there until some months after the copy was furnished Mitchell, if, as may be presumed, the alterations were made after the Treaty was ratified.

As between Spain and Forbes & Company, there is no doubt of the authority of the King's officers to consent to the antedating of the title and ratifying it.

Speake vs. United States, 9 Cranch, 28.

That there has been such a recognition of the validity of the alteration as in law amounts to a ratification, is shown by the foregoing official proceedings

Considering the acts of a Spanish official claimed to have been unauthorized by law, this court says: "all favorable presumptions will be made against the forfeiture of a grant. As before said, it will be presumed, unless the contrary is shown, that a public officer acted according to the law and his instructions. The government accepted Soto's acts and it does not appear that there was ever any attempt made to revoke or annul his proceedings or to assert a forfeiture for the cause now insisted on," holding it strong evidence in favor of an official act being valid that the protocol evidencing it, remains in the public archives, unrepudiated by the government.

Gonzales vs. Ross, 120 U. S., 605, (30-807;)

U. S. vs. King, 3 How. text, p. 786.

Such ratification is as effective as a new execution.

Penny vs. Corwithe, 18 John, text, 501.

Prouty vs. Wilson, 123 Mass. 297;

Stewart vs. Port Huron, N. P. K., 40 Mich., 348.

As an illustration of Spain's feeling that an indemnity should be made for the invalid grants it will be remembered that de Vargas, Rostro and Alagon, were all compensated largely by the King of Spain for the grants which were specifically annulled by the treaty of 1819.

B. But even if the alterations had been fraudulently made by procurement of the grantees, after the title had become vested in them, they would not have affected the title already vested. The doctrine seems to be settled that

the fraudulent alteration of an instrument does not affect rights already vested under it, but will only affect those which are executory or lie in action. Thus, in the case of a deed to real estate, an alteration after the title has vested will not divest the title already vested, but will prevent any action upon the covenants therein.

Mallory vs. Stodder, 6 Ala., 861;
Lewis vs. Payn, 8 Cow., 71;
Morgan vs Elam, 4 Yerger, 411, *et. seq.*;
2 Am. and Eng. Enc. of L. (2 Ed.) p. 196;
Doe vs. Hurst, 3 Starkie, p. 60, E. C. L., p. 162;
Woods vs. Hilderbrand, 46 Mo., 284;
1 Greenleaf Ev. Sec. 568, citations;
Jackson vs. Chase, 2 John, 84-87;
Hatch vs. Hatch, 9 Mass., 307;
Dana vs. Newhall, 13 Mass., 498; 138 U. S., 21;

And while the instrument could not be used as evidence of such executory or actionable rights, yet it can be used as evidence of those which have become executed.

Ala. State vs. Thompson, *et. al.*, 104 Ala., p. 570;
16 So. Rep. p. 449;
Insurance Co. vs. Fitzgerald, 16 Q. B. p. 450;
Davison vs. Cooper, 11 M. and W. p. 778-800;
Burnett vs. McCluey, 78 Mo., p. 676;
Chessman vs. Whittemore, 23 Pick., 231;
10 Wall., 36, 2 Ed. Smith L. C. 1, 1 Whart. Ev. 629,
158 U. S., p. 27;
Jackson vs. Gould, 7 Wend. p. 364;
North vs. Henneberry, 44 Wis., p. 306;
Lewis vs. Payn, 8 Cow., p. 71;
Alexander vs. Hickox, 34 Mo., 496;
1 Greenleaf on Evidence, Sec. 568 and citations;
2 Am. and Eng. Enc. (2 Ed) p. 204-188 note.

This doctrine is also confirmed by the following cases:

Patterson vs. McClay, L. R., 10 Ex. p. 360;
Ward vs. Wesley, 5 H. and N. p. 87;
Hutchins vs. Scott, 2 M. and W. p. 815-816;
Sutton vs. Toome, B. and C. p. 816; 14 E. C. L. p. 66;
Herrick vs Malin, 22 Wend., 388.

In this case there can be no doubt that all alterations were made *after the title had vested.* There could be no reason for the alterations until it became certain that the grants made before January 24th, 1818, would not be re-

cognized, and this was arrived at only after February 19th, 1819, when the treaty was signed. Berore that date it was not settled even between the negotiators, and the project for the treaty, submitted by de Onis for Spain, containing the stipulations as to parts, was on the 9th of February, 1819.

1 Ex. Papers, 1 Session, 16 Congress, Doc. No. 2, p. 34, read in Congress Dec. 7, 1819.

There is conclusive evidence that the alterations took place after Dec. 18, 1818, for on that day a copy of the order of Masot of March 23rd, 1818, was attached to the REGISTRO. Such copy now, however, shows the date March 23, 1818, to have been altered to read "January 23rd, 1818." If the Registro had been altered before the date when the copy of the order of possession was made to be attached such order would have been written to correspond, and, thus a clean copy with the date of January 23, 1818, and without any alteration whatever, would now appear as attached. But the copy attached was originally written (on December 18th, 1818, when attached) with the date March 23rd, 1818, and was, therefore, *after the time when it was written*, altered to show the date January 23rd, 1818. Of course the Registro was altered at the same time. Besides this, the alteration was necessarily after the 23rd of March, 1818, because if it had been at or before that time, then the order of Masot would have borne date January 23rd, 1818, and not have had to be altered so as to bear that date.

But long before this date the title had vested in the grantee.

On Feb. 20th, 1818, a year before the date of the treaty, (lacking one day,) the REGISTRO had been signed and deposited in the archives. It contained an adjudication of the claim of Forbes and relinquishment of his rights of an indemnity from Spain, and as we understand the civil law, vested the title in him at once. We quote: "Some stress is placed by counsel for appellants upon the facts that there is no proof as they claim of a delivery of the grant as alleged in the complaint, and we deem it proper to say what we have to say upon that subject in this connection. We held that the grant in this case was made in a manner not fatally repugnant to the regulations of 1789. Under these regulations there could be no delivery of the grant

as entered in Book A. The only thing to be delivered was a copy, or if you please, an alias original, which was not given to the grantee in the sense in which we speak of a private conveyance. It was not delivered to him because its delivery was necessary in order to give effect to the grant and vest in him the title to the lot. It was given to him merely in testimony of his right under the grant. We do not understand that the doctrine of delivery as applied by us to private conveyances, has any application to grants made by the government either under the Mexican system or our own. We so intimated in Downer vs. Smith, *supra*. We understand that the title under the grant vests the moment it has received the stamp of the last act required to completely authenticate the instrument, and that a delivery is not necessary.

(Marbury vs. Madison, 1 Cranch, 137;
Lott vs. Proudhomme, 3 Rob. La.. 293;
Lavergne's hejrs vs. Elkins heirs, 17 La. 226;")
Donner vs. Palmer, 31 Cal., p. 513.

Though an order of possession is sometimes made and executed, yet it is the grant which confers the title.

"The plaintiff complains that the Judge laid down an erroneous rule in charging that if the description contained in the petition and grant differed from that contained in the act of possession the former must prevail because it was the grant which conferred the title. We think that there is no error in this charge."

Pinkerton vs. Ledroux, 119 U. S., p. 254;
U. S. vs. Clark, 8 Pet. pp. 436-468;
U. S. vs. King, 7 How. text, p. 890.

That no delivery was necessary was also the rule of the common law. A patent or conveyance from the government confers title without delivery. The title vests in the grantee when the government officials have done all they can do except to deliver the evidence of the Grant. Thereafter it is held for the grantee.

U. S. vs. Schurz, 102 U. S , p. 378.

This court in that case refers approvingly to the very able opiniou of Judge Field, in which he says: "In case of a private deed it is essential that the grantor should part with his possession or the right to retain it, for until then he may alter or destroy it. But not so with the government deed. With the close of the record the power of the

officers of the government over the instrument is gone. Whether it thereafter remains in the land office or be transmitted to a local officer for manual delivery to the patentee, its validity and operation are unaffected."

LeRoy vs. Jamison, 3 Sawy. p. 369;
8271 Fed. Cases.

The granting words used by Cienfuegos "aplicaba y aplico" clearly establish that the title vested when Forbes' petition was judicially approved and granted. If further requirement, however, was needed, it was fulfilled in the act of the grantee in taking possession, and the evidence is that this took place in 1818, immediately after the return of the order of possession made by Governor Masot.

Testimony of Carlos Evans, 4 Am. State Papers, p. 172.

Masot ceased to be governor in May, 1818.

White's Recopilacion, Vol. 2, p. 256.

The ineffectiveness of the altaration in this case to destroy the grant and the title thereby created, seems to be fully shown in the case of

United States vs. West, 22 How. 315.

In that case this court decided that the alterations made by the Spanish officials enlarging or extending the grant did not invalidate the grant as to the property actually granted. Followed in U. S. vs. Juarez, 26 Fed. Cases, 688. This case is not overruled nor is its authority impinged upon by the case of

United States vs. Galbraith, 2 Black, p. 394,

in which it was commented upon and explained, because in the latter case the whole grant was fabricated at a date when the authorities had no power to make it, and it was antedated so as to cause it to appear to have been made when they had the power.

The West case, *supra*, is exactly the case which was before Judge Brackenridge upon the grant in controversy in its then status. As the case then stood the grant was antedated so as to make it appear to have been made before January 24, 1818, and was rejected because it was, in fact, made after that date. As the grant now stands, however, under the act of 1860, the grant is as effective whether made after or before January 24, 1818, if made before the cession, and therefore a finding that it was made on February 20th, and after the treaty date but antedated

so as to appear to come before the treaty date, does not affect its validity, unless the law be that an alteration necessarily avoids the instrument altered, a contention which we think we have met and disposed of.

There is another ground upon which it should be held that the alteration made in the date of the "registro" should not prejudice the title of the grantees, and that is that under Spanish law, title to lands might be made by parol. No writing was necessary for passing the title, apart from official regulations tending to the order administration of the land office of the government.

Law 6, Title 5, Partida 5,
Law 4, Title 4, Partida 4,
Law 2, Title 11, Partida 5,
1 Sala Illustracion Derecho Real 271;
2 Tapias Febrero Novissimo, Sec. 3, p. 134, (Paris Ed. 1855;)
Long vs. Dollarhide Co., 24 Cal., 218;
Mr. Justice Baldwin in Strother vs. Lucas, text, p. 450, *et. ante.*

If the Captain General might make an effective verbal grant of these lands to Forbes & Company, certain it is that an alteration in the date of his written grant could not destroy the effect thereof.

(g.) No right of Indian occupancy prevented the Spanish Captain General from making a valid grant of the lands to Forbes & Co.

1. The answer sets up the occupancy of the Indians, a general replication denies it. No evidence has been taken on the point and no proof appears in the record. Therefore of course the question is not in the case.

2. If, however, it had been proven that the Indians occupied the land at the time of the grant, this would not invalidate it. The fee was in the Spanish Crown, subject to the right of occupancy by the Indians, and when that occupancy ceased the title became united to the possession.

"Nor does there appear to have been any restriction on the powers of the governor to make grants of land under Spain, other than those imposed on the governors under Great Britain; both made grants without regard to the land being in the possession of the Indians; they were valid to

pass the right of the crown, subject to their right of occupancy; when that ceased, either by grant to individuals with the consent of the local governors, by cession to the crown, or the abandonment by the Indians, the title of the grantee became complete."

U S. vs. Fernandez. 10 Pet., 303;
Mitchell vs. U. S , 9 Pet., p. 711;
Fletcher vs. Peck, 6 Cranch, 143;
Reports of Coms. Vol. 4, Am. St. Papers, p. 93, (Duff Green Ed;)
2 White's Recopilacion, p. 324.

Seventh and Eighth Assignments of Error.

These assignments of error (p. 133, Tr.) are,

"7. The Court erred in decreeing that the petitioners herein were entitled to receive from the United States a patent for all the described tract of land not sold or otherwise disposed of by the United States, and entitled to enter any of the public lands of the United States, liable to entry at one dollar and a quarter per acre, to an amount equal in extent to that which has been sold by the United States within the boundaries of the described tract, according to the 6th Section of the Act of Congress approved June 22nd, 1860."

"8. The court erred in deciding that a claim for lands in West Florida, by virtue of a grant made by the Captain General of Cuba on the 20th day of February, 1818, could be confirmed under the provisions of the act of Congress approved June 22nd, 1860."

They both raise the same contention. That is, that a grant of land made on February 20, 1818, cannot be confirmed under the provisions of the act of June 22nd, 1860.

We answer with confidence:

Even if both Spain and the United States stipulated by the 8th article of the treaty of 1819 that perfect titles made after January 24, 1819, should not be recognized by the United States, the act of 1860 removed the bar created by the treaty and permitted the

enforcement of such grants in the United States Courts within the time limited by the act, as extended by the subsequent act of 1872.

1st. Congress had power to remove the bar and make the grant effectual, though theretofore made ineffectual.

2nd. The proper construction of the act shows that it did so do. Such construction results,

A. From the language of the act and a comparison of it with former acts, and the decisions of this court, indicating the liberal policy of the United States with respect to Spanish grants, and the enlargement of such policy, and

B. From the decisions of this Court directly upon this act, construing it as we contend.

1. Of course, the congress had power to declare that the grants that it had theretofore declared to be null should no longer be so, but should be entirely operative. If they were perfected before the treaty they were null only by virtue of the arbitrary will of the two treaty making parties. This invalidation of them was solely a matter of policy on the part of the United States in order to protect itself against the imposition which it feared, if it recognized grants made after Spain had made a proposition for a cession, to-wit, October 24th, 1818, but in the treaty stated to be Jan. 24th, 1818, and after it presumedly became indifferent as to the number or extent of the grants being made by it. Being thus a protection to the United States it could, of course, waive that protection.

If the land had not become effectually the land of private grantees before the cession, it then became the land of the United States, and being so, that Government could dispose of it as it saw fit. These things seem truisms, unless it should be held that the treaty was a compact between the two nations and that the United States could not alter it in any way. On that point it suffices to say that a treaty can be abrogated by an act of Congress inconsistent with it, or directly repealing it, and in such a case the treaty, or the

repealed portion of it ceases to exist, and the act is the operative law.

Headmoney Cases, 112 U. S., 580; 130 U. S , 238;
Whitney vs. Robertson, 124 U. S., 190, 196; 143 U. S., 570;
: 130 U. S., 581, (32-1068:)

This being so, the only question in any case is the question of construction, *i. e.*, whether Congress intended to displace the treaty provision and substitute therefor the statutory will. Applied in this case the question is, whether a proper construction of the Act of 1860 necessitates a holding that it intended to depart from the earlier policy of the United States,—a refusal to recognize Spanish Grants in Florida made after Jan. 24th, 1818, and before the effectuation of the possession of the United States, as enforceable grants,—or whether it intended that such grants should be put on the same plane and subject to the same defences only as those made prior to that date.

That the latter was the design can be clearly shown;

2. It results from

A. The language of the act;

B. The purpose of the act, and is conclusively demonstrated by

C. Decisions of this Court as to lands embraced within the act, but not governed by the exception in the treaty of 1819, and

D. Decisions of this Court directly upon the effect of the act upon lands, the title to which was by the eighth article of that treaty excluded from recognition.

A. The first canon of construction of an act is to find what an act says; if that is clear and unambiguous that must control. This act is clear in its inclusive provisions and in its exclusive provisions. In the former it includes lands having the status of those here in litigation, and in the latter it shows under what circumstances only such lands are to be excluded from the operation of the act.

The first section provides for the presentation to certain Commissioners of claims for "*any lands* lying within the States of Florida, Louisiana, or Missouri, by virtue of grants, &c., * * * * bearing date prior to the cession to the United States of the territory out of which said states were formed, or during the period when any such government claimed sovereignty or had actual possession of any such

district or territory in which the lands so claimed was situated."

This includes *all lands* held as provided. It excludes none by reason of the time when the right to them accrued, provided that such right accrued before the cession or transfer of actual possession. The language is as broad as possible and must be taken in its full breadth, unless there be controlling reasons to the contrary. Instead of such reasons there are, as we shall show, conclusive reasons why the act should be construed as we contend.

The eleventh section provides for presentation to the Court of "*any case of such* a claim to lands as herein before in the first section of this act mentioned." "Where such lands are claimed by complete grant or cession * * * prior to the cession to the United States of the territory in which said lands are included," etc. This language is equally broad and includes all perfected grants, etc., provided they were not made after the cession or transfer of possession.

In neither of these sections is there any hint that there was to be found a meaning which limited the grants covered by them to those made before Jan. 24th, 1818. Upon the contrary the language is directly antagonistic to such a construction, for it expressly fixes a later date as a limit of time in which grants cognizable, under the act, could have been made. The cession, of course, could not be before the date of the treaty, to-wit, Feb. 19, 1819, but if the act could be construed as defendant contends this provision would have read thus: "The Court shall decide the claim valid or invalid if the grant was made before Feb. 19th, 1819, provided that it was made before Jan. 24th, 1819." The contradiction of terms is clear.

The only words of any exclusion also indicate that all grants except those excluded by the proviso of the third subdivision of the third section are to be within the benefit of the act. (This proviso and not the whole section as would seem from the language of the eleventh section is incorporated by reference into the eleventh section.

U. S. vs. Scull, 98 U. S., 410;
U. S. vs. Morant, 123 U. S., 335;
U. S. vs. Clamorgan, 101 U. S., 822, (25-837.)

The converse of the rule "*expressio unius*," etc., is also true, *i. e.*, that the naming of specific things as excluded

will raise a construction including all other things which are not embraced in the specific exclusion.

This is why the act excludes from the "*all lands*" covered by complete grant or concession only those which had been rejected by the Board of Land Commissioners, or other public officers as having been fraudulent, or procured or maintained by fraudulent means, or which had been twice rejected on their merits by previous Boards of Commissioners. If the grant was complete and had not been rejected by the tribunals and for the causes mentioned in the proviso, then it is cognizable by the Court under this act without regard to the time when made, if made within the time fixed in the act.

B. The purpose of the act can be clearly demonstrated to have been to provide for the investigation of grants which had not theretofore been recognized as valid by the United States, but which considerations of justice or leniency required should be recognized by it.

In fact it can be conclusively assumed that there were but few other grants which could be presented to tribunals organized after 1860. The territory West of the Perdido had been occupied by the United States since 1803 (upon the taking effect of the treaty with France) and that East of the Perdido had been the property of the United States since a time not later than the transfer of possession July 21st, 1821. Beginning with the act of March 26th, 1804, (2 Stat. at L., 283,) Congress passed numerous acts for the purpose of enabling claimants of lands within the territory West of the Perdido to enforce such claims, and beginning with the act of May 8th, 1822, (3 St. at L., 709,) passed like acts for the benefit of claimants to those lands east of the Perdido. It may fairly be assumed that after the lapse of fifty years in the former class of cases and forty years in the latter class, nearly all the claimants to whom the tribunals created by Congress were open had tested their grants in those tribunals.

There was a large class of grants, however, to whom those tribunals were not open, that is to say, those grants made in the territory west of the Perdido, after the treaty of San Ildefonso, by which the territory was conveyed by Spain to France, but before the actual transfer of the possession of the territory by Spain to the United States (the successor in title to France) and those grants made by the

lawful authorities of the King of Spain within the territory east of the Perdido, after January 24th, 1818, but before the cession or transfer of possession actually took place. The United States steadily maintained that all grants made between the two extreme dates, in both classes of cases were void, and as steadily refused to recognize any right in the claimants or to extend any leniency to them.

As early as the act of March 26th, 1804, (2 Stat. at L., p. 283, Sec. 14,) Congress declared void all grants made after the treaty of San Ildefonso, and the prohibition against the grants made east of the Perdido annulled by the 8th Sec. of the treaty of Feb. 19, 1819, is emphasized by subsequent legislation, the 6th Sec. of the act of May 23rd, 1828, (4 Stat. at L.; p. 284,) explicity declaring that "nothing in this section shall be construed to authorize said judges to take cognizance of any claim annulled by said treaty or the decree ratifying the same by the King of Spain," and the 4th Sec. of the act of May 26th, 1830, (4 Stat. at L., p. 405,) expressly limiting jurisdiction of the courts to determine titles otherwise than according to the restrictions and limitations prescribed in the Act of May 26th, 1824, (4 Stat. at L, p. 52,) *i. e.*, according to "the stipulations of any treaty." Section 2, Act May 26th, 1824.

United States vs. Repentigny, 5 Wall., 211, (18-683.)

It would be a useless parade of research and learning for us to follow the various acts of Congress relating to these two classes of land and to show the gradual development of the liberal policy of the government in the treatment of all claims not coming within these two classes and the rigid adherence to the exclusion of these classes. Suffice it to say that they were constantly excluded either by statutory negation of the powers of the Commissioners and Courts to take cognizauce of them, or by provisions that the decisions of all claims should be according to the terms of the treaties and of international law, etc. The terms of the two treaties were invariably held to exclude the grants made within the respective periods mentioned above.

Gradually, however, the liberality to other claimants began to reach this class. Apparently the act of June 17th, 1844. (5 Stat. at L., 676,) was designed to reach them, but this Court decided that complete grants were not embraced, and held that it must follow the political department,

which held that the lands West of the Perdido were granted by France to the U. S., by the treaty of 1803.

U. S. vs. D'Auterive, 10 How., 609;
U. S. vs. Phil. and N. O., 11 How., 609;
Montault vs. U. S., 12 How., 47;
U. S. vs. Castant, 12 How., 437;
2 Pet. 317; 12 Pet., 516;
9 How., 151; 11 Wall., 643.

The effort was continued, however, and the consummation of the endeavors of Mr. Benjamin and others was the act of 1860, under consideration. The progress of these endeavors is well set forth in U. S. vs. Lynde, 11 Wall., and need not be repeated

Its history and its purpose is written broadly on the face of the act and is accomplished in two ways; first, by the fixing of a new date, the date of the cession or of the actual transfer of possession, instead of the dates fixed; as to the territory West of the Perdido, by the date of the treaty of San Ildefonso, and, as to the territory East of the Perdido, in the 8th article of the treaty of Feb. 19, 1819, and, secondly, by studiously refraining from requiring these claims to be adjudicated according to the *principles established by the treaties*, as had been done in previous acts, and by substituting therefor the declaration that the adjudication shall be that these claims were "valid or invalid according to the principles of *this* act," those principles of untrammeled justice and equity being entirely different from the principles of the treaties and the former acts, they shutting out and this letting in grants made in the extended period prescribed by this act.

We submit that from the face of the act, its inclusions and exclusions, from the comparison of it with preceding acts, and from the circumstances just above considered, there can be no question that grants made in Florida after Jan. 24th, 1818, have been taken from under the bar of the treaty and subjected to the same investigation as those made before. As this Court says, "That is the unavoidable inference to be derived from its language and from the acts and course of decisions out of which it arose."

U. S. vs. Lynde, 11 Wall., 632.

We have gone over this recital and reasoning because of the charm of the subject and the importance of the case, but it is scarcely necessary to do so, because,

C. Decisions of this Court decide the *principle* absolutely, *i. e.*, that grants in the territory west of the Perdido and invalid because made after the treaty of San Ildefonso were validated by the Act of 1860 under consideration. The position of such grants differed, of course, in respect to their invalidity and the design of the act to validate them, in no wise from the grants to lands east of the Perdido. The former were invalid because of the fact that the United States refused to admit that Spain was at the time of the grant the owner of the territory in which the lands granted lay, while in the latter the invalidity arose out of the positive stipulation between Spain and the United States, that the United States would refuse to recognize them if made after Jan. 24, 1818. The reason for their invalidity was, therefore, different, but the fact of invalidity was the same, and the reason for the validation was the same, *i. e.*, the awakening of the United States to the consideration that the equities in favor of the recognition of such titles should overbear the legal objection to their enforceability.

If, however, the original bases of invalidity of the grants in the territories upon the east and west of Perdido were different, yet they soon became the same, for by the Act of March 26th, 1804, there came into existence a legislative declaration of the invalidity of the grants west of the Perdido; specifically declaring such grants "to be and to have been from the beginning null and void and of no effect in law or equity," while as to the land east of the Perdido, a like legislative declaration arose in the Act of May 8, 1822

The position, then, with respect to these two classes of grants, as to their annulment, was the same, and the language of the act of 1860, being equally applicable to both, a decision that one class was validated by the statute is equally a decision that the other class was likewise validated.

Such a decision, point blank, as to the lands West of the Perdido, is found in

U. S. vs. Lynde, 11 Wall., 632.

This case presents a view of the causes which led to the passage of the statute, and, after holding that if the statute

had not been passed the grant in controversy would have been invalid, says:

"The act authorizes the claimants to present their claim for confirmation, and although it does not, in so many words, say that grants made by foreign governments, while in the possession of the territory and claiming sovereignty over it, if complete, regular and fair, shall be sustained, yet that is the unavoidable inference to be derived from its language and from the events and course of decisions out of which it arose. And although it does not expressly repeal that part of the Act of March 26th, 1804, which declared void all grants of land within the ceded territories made after the date of the treaty of San Ildefonso, yet its provisions, to have any effect at all, must be regarded as irreconcilable with that clause of the Act of 1804, and, consequently, as repealing it by implication."

Not only is this the language of this Court, but its decision was that the grant which had been made after the treaty of San Ildefonso and by Congress declared null and void, from the beginning, was, by virtue of the Act of 1860, validated, and it was confirmed.

This decision has never been doubted, but the point decided in it, as above, has been uniformly recognized. Thus, while the Court refused in a later case to confirm a grant because no present title was granted, but the claim was merely an uncomplied-with permission to inhabit and cultivate, yet it reaffirmed the principles of the act as follows:

"The objection of want of title in the granting power was removed by the act as to all grants made by the government in possession which were otherwise sustainable on the principles of justice and equity."

McMicken vs. U. S., 97 U. S., 204.

And again in confirming a grant this Court said:

"Although made, according to the views of our Government, after the title of Spain had ceased to exist, yet it was made while that government had actual possession of the country and claimed sovereignty thereof, and, therefore, it is within the purview of the Act of 1860, (12 Stat. at L., p. 85,) and comes clearly within the case of U. S. vs. Lynde, (11 Wall., 632.")

U. S. vs. Watkins, 97 U. S., 219.

In subsequent cases, which it is unnecessary to quote from, the same principle has been announced and applied;

Scull vs. U. S., 98 U. S., p. 410;
U. S. vs. Clamorgan, 101 U. S., p. 822;
Dauteri ve vs. U. S., 101 U. S.. 700.

It will be noted that while none of these cases relate to land east of the Perdido, yet that they are not confined to the "disputed territory" lying between the Perdido and the Mississippi, but one of them was in the "neutral territory," (U. S. vs. Perot, 98 U. S., 428,) and another in Missouri, (U. S. vs. Clamorgan, 101 U. S.)

This act, thus, was applied to grants of land irrespective of the territory in which they lay.

The only suggestion, which has been made, by the attorneys for the United States, why these decisions should not apply to land east of the Perdido is that this Court has expressly declared that while "the act was intended to validate all grants which were made to *bona fide* grantees of lands in the disputed territory while the Government remained in possession of the territory and claimed sovereignty over it," yet that it has also declared that such validation was "subject, of course, to the express exceptions of the treaty of 1819 and the supplemental declaration of the King of Spain finally annexed thereto."

This reservation by this Court evidently referred to the grants to Punon Rostro, de Vargas and Alagon, which were the express exceptions in the 8th article of the treaty and supplemental declaration. The Court refers to the treaty and the supplemental declaration as jointly defining the exceptions, yet the only exception in the supplement are these three grants. They, though not mentioned in the Act of 1860, did not come within its beneficent provisions, for their invalidity did not arise because of the time when they were made, but from the specific exclusion of them. Of course, the general terms of the act could not be construed to apply to grants specifically named in the treaty as excluded from recognition.

If the language of this Court, just quoted, does, however, have the meaning attributed to it by the appellant, then it is sufficient to say that the Court, having in mind lands in the disputed territory, used without reflection this language with reference to lands outside of it. This is shown conclusively by

D. The decision of this Court, expressly that the act applied to lands east of the Perdido, granted after Jan. 24th, 1818.

U. S. vs Morant, 123 U. S., p. 335.

This case is directly in point, has never been questioned, and is conclusive of the right of petitioners to resort to this Court for a confirmation of this grant, and to have it confirmed even though made after January 24th, 1818.

In that case two grants were in question, both made before Jan. 24th, 1818, but the order of survey had not been actually executed anterior to that period. The Commissioners rejected them on the grounds that there had been no evidence of cultivation, and that a grant was not perfect until an order of survey had been executed, and that this had not taken place until after Jan. 24th, 1818.

Outside of the question of fact as to cultivation (which this Court found in favor of the claimants,) two questions of law were presented; First, whether the grant was made after the period fixed in the treaty, because the order of survey was executed after that period, and Second, whether, if so made after that period, it was, therefore invalid and unenforceable even after the passage of the act of 1860.

This Court could have decided the case by deciding that although the orders of survey were not executed until after Jan. 24th, 1818, yet the grants was made before, but it deliberately, and in terms put aside a discussion of this question and decided the other, saying,

"The Commissioners construed these provisions of the treaty as invalidating grants made prior to the date named, if the surveys were not completed until after that date. This construction was oppposed by the claimants who were affected by it, and a different view, perhaps, might well have been taken. But, be that as it may, the Act of 1860, under which the present proceedings were instituted made the date of the cession to the United States, or the time of transferring possession, the point from which to test the validity of grants. That act was passed for the relief of the parties who claimed lands in Florida, Louisiana, or Missouri, by virtue of grant, concession, or of survey, permission to settle or other written evidence of title emanating from any foreign government, bearing date prior to the cession to the United States of the territory out of which said states were formed, or during the period when any

such government claimed sovereignty or had actual posession of the district or territory in which the lands so claimed were situated."

Thus, the adverse holding of the Commissioners directly on the point was disapproved, and the grant was confirmed. This is conclusive and there need be no further discussion of the objection.

The objection that the grant may not be confirmed under authority of the Act of 1860 is, therefore, directly met and conclusively overcome by the decision of this Court.

The right to have this grant confirmed is not barred by any rejection by any public officer, acting under authority of Congress, as fraudulent.

The argument of the United States *contra*, is based upon the reasoning that the eleventh section of the Act of 1860 prevented the court below from passing upon any claims coming within the purview of the third section of the act; that this third section prohibited the confirmation of claims which had been rejected by any public officer acting under authority of Congress; that Judge Brackenridge rejected this claim as fraudulent; that he was a public officer acting under authority of Congress, and, therefore, that the court below had no authorty to confirm this claim.

The answers to this are manifest:

1. That Judge Brackenridge was not such public officer as contemplated in the third section;

2, That he did not reject the claim as fraudulent; and,

3. That having found that the grant was made after January 24, 1818, he had no jurisdiction to decide that the claim was fraudulent.

(Only the proviso of the fourth paragraph of section three of the act of 1860, and not the whole section, is meant by the reference to the third section in the eleventh section.

United States vs. Scull, 98 U. S., 410;
United States vs. Morant, 123 U. S., 325.)

1. The public officers contemplated in this proviso were the registers and receivers, who by sundry acts of congress had been authorized to investigate these claims.

See Section 3 of the act of March 3, 1823, (3 Stat. at L.,

p. 757,) and Section 6 of the act of March 3, 1825, (4 Stat. at L., p. 126.)

Rejections by Boards of Commissioners had just been provided for, but to make the exclusion complete, it was necessary to include other officers to whom congress had from time to time given authority to investigate and confirm or reject.

Under the rule *ejusdem generis* the "other public officers" must be taken to be those of like kind with the Boards of Commissioners just named, (2 Lewis' Sutherland on Statutory Construction, Sec. 433; State vs. Ennis, 79 Mo. App., 12,) that is, functionaries created by acts of congress for special limited services; officers whose decisions would not ordinarily be final, but upon whose findings, based upon the ground mentioned in the proviso, the act of 1860, places the seal of finality. The decisions of the courts upon the contrary would in all cases be final. If a lower court should reject a claim upon the ground of fraud, that decision would be final unless appealed from, and if an appeal were taken, the decision of the appellate court would be final. There was, therefore, no necessity for including courts in the scope of this proviso. If it was so intended, it is inconceivable that congress should not have declared such intention specifically, instead of using words which were at the least inapt in conveying such meaning. The same result would arise from the application of the rule that general words following particular will not include things of a superior class, and the Court being of a class superior in its functions to the Boards of Commissioners, Courts would not be included in the "other officers." (2 Lewis' Sutherland on Statutory Construction, Sec. 435.)

2. Judge Brackenridge did not reject the claim as fraudulent. He expressly devoted himself to finding "whether this be a genuine grant within the time fixed by the treaty," because he says, "if it be not, it is useless to take into view the authority of the granting power *or the regularity* of the grant." (Transcript p. 76.)

The first inquiry as to whether it was a genuine grant, he solved readily, relying, outside of other considerations, upon the admission of the parties, saying, "I consider this as superceding all further inquiry. The official signatures are admitted to be genuine."

This having been decided, he set himself to finding whether the grant had been made before January 24, 1818, the limit provided in the treaty, or thereafter. The evidence presented by the petitioners purported to show that it was made before that date. The grant—registro—introduced by the United States showed that it had been made after, but that the dates had been altered for the purpose of making it appear to have been made before. Two questions then presented themselves. Did the exemplification presented by the petitioners, or the registro presented by the United States, control, and if the latter, did it show that the grant was made after January 24, 1818?

The Judge decided that the registro controlled, and that it showed the grant to have been made after January 24, 1818. In determining this he had also to determine whether the registro as altered, or as it was before alteration, controlled, and he decided that there being no *salvado* to the alterations, they were ineffective and that though the alterations, if given effect, would have shown the grant to have been made before January 24, 1818, yet, since they had no effect, the instrument must be taken to have been made at the date shown before alteration, that is, after Jan. 24, 1818. The result of all this was that he found the grant to have been made after the time recognized by the treaty, and hence not confirmable by him, the express authority under which he acted (Sec. 6, Act of May 23, 1828, 4 Stat. at L., p. 285,) forbidding him "to take cognizance of any claim annulled by the said treaty, or the decree ratifying the same by the King of Spain."

He does use language which seems to show that he thought the absence of the *salvado* fatal to the grant, but it cannot be conceived that he intended to make that a foundation for his decree, for the reason that such a holding would have been palpably wrong in the face of the Spanish Law and of the common law, (See page 81 and following of this brief) and that such a holding would have been unnecessary and *obiter*, for whether the grant was entirely void by reason of the alterations, without a *salvado*, or not, was immaterial, for even though genuine, if made after January 24, 1818, it was annulled by the treaty.

Besides this, the fact that he might have found the grant to be void by reason of the absence of the *salvado*, was not tantamount to a finding that it was void because fraudulent,

nor to rejection because fraudulent. We apprehend that under the view which he took, even alterations made innocently and properly at the time of the making of a grant, not saved by a *salvado*, would have the effect of avoiding the grant. If this be true, then of course a finding on the ground of voidness for this reason was not a finding that the grant was fraudulent.

It seems clear from the decision, that it was not rejected by him (that is, because,) fraudulent, but as (that is, because,) not made before January 24, 1818.

3. But even if Judge Brackenridge intended to decide that the grant was fraudulent, he was without jurisdiction to do so, because after he decided that it had been annulled by the eighth article of the treaty, and therefore was beyond his cognizance under the act investing him with jurisdiction, he had no right to inquire into the merits of the grant or into any objections to it.

For the sake of saving a repetition, we refer specially to our argument on this point on pages 73 to 75 of this brief, and particularly to the decision of this court there cited.

United States vs. Baca, 184 U. S., 63.

Respectfully submitted,

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